United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1398

To be argued by
JED S. RAKOFF

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1398

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARMINE TRAMUNTI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Carmine Tramunti appeals from a judgment of conviction entered on February 27, 1974 in the United States District Court for the Southern District of New York after an eight-day trial before the Honorable Arnold Bauman, United States District Judge, and a jury.

Indictment 73 Cr. 514 charged Tramunti with seven counts of giving false testimony under oath, in violation of Title 18, United States Code, Section 1623, when he testified (as a defendant) in a 1971 conspiracy trial, *United States* v. *Aloi, et al.*, 70 Cr. 967 (the "Imperial trial"). Prior to trial, the seventh count was dismissed as being multi[illegible]tous of charges embraced in the other counts. The [illegible]ining six counts charged Tramunti with lying when he denied knowing and meeting five of the alleged Imperial conspirators, namely, Michael Hellerman (Count 1),

John Kelsey (Count 2), Murray Taylor (Count 3), Vincent Gugliaro (Count 4) and Phillip Bonadonna (Count 5), and lying when he denied attending a luncheon at Gatsby's Restaurant at which putting up "front money" for the Imperial securities manipulation scheme was discussed (Count 6).

On October 25, 1973, the jury found Tramunti guilty on all six counts. On February 27, 1974, Judge Bauman, noting that Tramunti had lived his "adult life entirely outside of the law", sentenced Tramunti to concurrent terms of five years imprisonment on each count.

Statement of Facts *

A. Government's Case

Michael Hellerman, a convicted securities swindler now cooperating with the Government, testified that he had known, met and conversed with Tramunti on numerous occasions prior to Tramunti's testimony at the Imperial trial, including six occasions of which he remembered the specific details: 1) At McCarthy's Steak House (along with Hellerman's wife, Marianne); 2) At the business office of Tramunti's friend, John Dioguardi (an office suite that later became Hellerman's own); 3) At the wedding of the son of Joseph Columbo (at which Hellerman brought Joseph Barone, a singer, to provide entertainment); 4) at the Pussycat lounge (owned by Bruce Bozzi); 5) At the Royal Box nightclub of the Americana Hotel (along with Marianne Hellerman, John Kelsey and Constance Kelsey); and 6) Outside Courtroom 110 at the time of the Imperial trial (at which time Hellerman, who had been called as a wit-

* Further particulars, especially in regard to the prior Imperial case and the subsequent At-Your-Service-Leasing case, are set forth below in the Argument, in the discussions of the specific points on appeal to which they relate.

ness by the defense in the Imperial case, was told by Tramunti to "do the right thing" on the stand) (Tr. 81-95).* On cross-examination, it was brought out that Hellerman had been a very bad fellow.

Hellerman's testimony was directly corroborated by the testimony of Marianne Hellerman as to the McCarthy's Steak House and Americana meetings (Tr. 428-433) and by John Kelsey (a minor participant in the Imperial manipulation) and his wife Constance Kelsey as to the Americana meeting (Tr. 291-293 and 195-198). It was inferentially corroborated by Joseph Barone, who (appearing non-voluntarily, after the issue of a material witness warrant) admitted that he had performed at the Columbo wedding at Hellerman's request and that both Hellerman and Tramunti (as well as Dioguardi) were there (Tr. 516-519); by Bruce Bozzi, the owner of the Pussycat (a one-room lounge or nightclub), who testified that Tramunti, Dioguardi and Hellerman all frequented the Pussycat during the years 1968-1970, that he never saw Hellerman there except when Dioguardi was there, and that he had a specific memory of Tramunti and Dioguardi associating together there (Tr. 272-278); and by Gilbert Dragani, who testified to seeing Tramunti and Hellerman talking together in one room of Hellerman's (formerly Dioguardi's) office suite at the time the "closing" of the At-Your-Service-Leasing securities manipulation (of which Dragani was a part) was being transacted in another room of Hellerman's suite (Tr. 408-412).

John Kelsey also testified to being present at the Gatsby's luncheon meeting referred to in Count 6, during which luncheon there was a discussion of the Imperial manipulation. Present at the table with Kelsey were John Dioguardi, Murray Taylor, Phillip Bonadonna, two men both named "Vinnie", *and* the defendant Tramunti, who made

* "Tr." refers to the transcript of the instant trial.

no real entry into the conversation but nodded his head occasionally (Tr. 287-290). Also, a photograph (Government Exhibit 4) was introduced through the testimony of FBI Agent Nelson Conover showing Tramunti and Vincent Gugliaro exiting the front door of Claridge Caterers in Brooklyn following the wedding of a daughter of Richard Fusco in 1965 (Tr. 400-402).

Cross-examination of these various witnesses focused on the fact of the spousal relationship between the two Hellermans and between the two Kelseys, on the fact that John Kelsey had not been prosecuted for some of his past crimes, including perjury, and on the fact that Constance Kelsey had been unable to positively identify Carmine Tramunti at the time of the Imperial trial in 1971.*

B. Defense Case

The defense called three witnesses. The first, Daniel H. Greenberg, Esq., testified that he had been Tramunti's lawyer in the Imperial case and that Hellerman could not have met Tramunti in the hallway outside Courtroom 110 as Hellerman had testified because on the day in question he, Greenberg, was with Tramunti and never saw him converse with Hellerman. Greenberg also gave his recollection of the failure of Constance Kelsey to identify Tramunti at the Imperial trial (Tr. 528-536). On cross-examination, Greenberg admitted that he had represented Tramunti in several matters, including the first stages of the instant perjury prosecution. He claimed that he presently re-

* Constance Kelsey was a Government rebuttal witness in the Imperial case and John Kelsey was a witness there on the Government's direct case. None of the other witnesses called in the instant trial were Government witnesses in the Imperial case, and the incidents involving McCarthy's Steak House, the Columbo wedding, the Pussycat Lounge, and John Dioguardi's office were not introduced by the Government in the Imperial case (nor, apparently, were they known to the Government at that time).

membered, vividly, never once leaving Tramunti's side, even when Tramunti went to the men's room, on the day of Hellerman's appearance, although he had previously testified in the Grand Jury that his memory about the day in question was unclear (Tr. 536-547). Greenberg's responses on cross-examination were so unresponsive to the questions asked that, finally, Judge Bauman, outside the presence of the jury, had to warn Greenberg that he was deliberately and repeatedly ignoring the Court's orders and would be in contempt if he so continued (Tr. 544).

The second defense witness, Robert Mitchell, Esq., another lawyer present at the Imperial trial, contradicted Constance Kelsey's assertion that Tramunti put on his eyeglasses at the time of her failure to identify him in the Imperial trial and that this was one of the reasons she failed to identify him (Tr. 555).

The final defense witness was the defendant, Carmine Tramunti, who reasserted that he did not know Hellerman, Kelsey, et al., and that he did not attend the Gatsby's luncheon. He did concede on direct, that he had been at the Royal Box of the Americana on the same night that American Express records, introduced earlier by the Government, had established that Kelsey and Hellerman were there, but he noted that there were many people at the Royal Box that night and he denied meeting with them on that occasion or any other. Similarly, he admitted being at the Columbo and Fusco weddings, at the Pussycat, Gatsby's, and McCarthy's Steak House, but again pointed out that many persons were at these places and events and specifically denied meeting the particular persons in question here (Tr. 597-617).

On cross-examination, the Government was first permitted to inquire briefly into the witness's background (as the defense had been permitted to do, at length, with every Government witness), except that no reference was per-

mitted to Tramunti's two prior felony convictions. Tramunti claimed that his sole source of income was as one of "bosses" of Eifel Classics Coat Corporation, from which he made twenty to twenty-two thousand dollars a year. Confronted with his statement to Assistant United States Attorney John M. Wing that he made $38,000 in 1972, he stated that that latter sum was the amount of income he filed for on his tax return not the (lesser) amount he made. When Tramunti was able to specify the occupation of his friend of 30 years' standing, John Dioguardi, and his own occupations of the years 1962-64, he was then confronted with his failure to remember these same occupations when appearing before a federal Grand Jury in 1966. He admitted making the 1966 statements, but refused to categorically admit or deny that they were lies (Tr. 618-640).

Further on cross-examination, Tramunti admitted frequently drinking together with Dioguardi at the Pussycat, but claimed that when Dioguardi was with other people [Hellerman] he would never go to Dioguardi's table nor would Dioguardi ever come over with them to his table, though Dioguardi might come over alone. Tramunti also admitted being at the Fusco wedding at the Claridge Caterers in 1965, although he was then forced to admit that at the time of the Imperial trial he had claimed not to remember being at Claridge Caterers (Tr. 640-658).

In short, as the Government later argued on summation, Tramunti, while still maintaining all his denials as to the points charged in the instant indictment, developed sudden recall for other facts and events which he had been unable to remember on prior occasions on the stand when those other points were of significance and (unlike now) were uncorroborated by independent proof. An extreme example of this was the final episode of his examination—the re-direct, recross, and re-redirect—when he attempted to account for his sudden ability to give Dioguardi's occupation,

even though he had been unable to give it in 1966 (when by his testimony he had already known Dioguardi well for around 20 years), on the ground that, in some unexplained way, he had first found out what Dioguardi did for a living sometime between his 1966 Grand Jury appearance and his present appearance on the stand (Tr. 677-687).

ARGUMENT

POINT I

There was no error in the Government's introduction of Tramunti's 1966 false and evasive answers under oath.

At trial, the defendant Tramunti was cross-examined with Grand Jury testimony he gave in 1966 (Tr. 627-647, 683-684). Specifically, Tramunti was asked to account for having given false, evasive, unresponsive answers under oath in 1966 when he denied knowing what John Dioguardi, a friend of over 20 years acquaintance (Tr. 684), did for a living and, even more incredibly, could not remember any of his own occupations of some two and three years earlier. This prior testimony—whose false and evasive character was confirmed by Tramunti's ability at the instant trial to remember what he could not remember in 1966—was highly relevant to impeach Tramunti's credibility as a witness at trial and, as prior similar acts, to establish that Tramunti acted with guilty knowledge and intent when he gave the 1971 false trial testimony which was the subject of the instant indictment. It is critical to note that at no time in the instant trial were the occupations of Tramunti and Dioguardi at issue, nor were the 1966 Grand Jury statements offered in any way, shape or form as truthful statements or for any bearing the content of those state-

ments might have on any of the external factual questions in dispute in the case (such as where Tramunti was at given times and places). Rather, as the record clearly shows, these 1966 statements were offered entirely to show that, on matters on which Mr. Tramunti's memory was now bright and clear and on which, in any case, one could be expected to have near total recall (in particular, as to what one's own occupations had been), his memory had wilfully failed him on an earlier occasion when he was under oath, and that from this the jury could infer that Tramunti's failure in 1971 to remember knowing Hellerman, Kelsey, Gugliaro and the others, was not, as he in effect argued (Tr. 746-755),* mere oversight (as because there were hundreds of people at the Americana, at the Columbo and Fusco weddings, etc., *e.g.*, Tr. 604, 609, 613), but rather was deliberate perjury.**

Tramunti was under a grant of immunity at the time he testified in the Grand Jury—a fact of which government counsel were unaware at the trial and only learned after conversations with defense counsel following the trial. Tramunti, who was in the best position to know that he had been under immunity, raised no objection at trial on this ground to the introduction of the 1966 testimony. However, in his post-trial motion and now on appeal, he argues that the use of the 1966 testimony was impermissible and an error of such magnitude as to require the drastic

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* The defense summation, and much else of relevance, does not appear in Appellant's Appendix. Appellant did not serve on the Government a designation of what he intended to include in the Appendix nor did he confer with the Government as to what should be so included. See Rule 30(b), Federal Rules of Appellate Procedure.

** Neither below nor now on appeal has Tramunti challenged the relevancy of such evidence for impeachment and as prior similar acts. His only objection at trial was on the grounds of remoteness, a point not pursued by him here on appeal, where his sole objection relates to the immunity problem.

relief of granting a new trial. Judge Bauman found this argument contrary to both the controlling case law and the policy bases underlying immunity, and denied the motion.

A. The Constitutional Issues

As Judge Bauman noted (219a), in two cases in particular the Supreme Court has rejected defense arguments very similar to those put forth by Tramunti here.

The earlier of the two cases is *Glickstein* v. *United States*, 222 U.S. 139 (1911). Glickstein was a bankrupt who had been required to answer questions, under oath, in a bankruptcy proceeding, pursuant to an immunity provision (Section 7, subdivision 9, of the Bankruptcy Act of 1898) which provided flatly that "no testimony given by [the bankrupt in such proceeding] shall be offered in evidence against him in any criminal proceeding." Despite this absolute language, Glickstein was prosecuted for perjury in connection with his testimony at the bankruptcy proceedings, and at trial his testimony from those proceedings was introduced over specific objection that it was barred by the above-quoted clause. In affirming Glickstein's conviction, the Supreme Court held, first, that the Fifth Amendment does not deprive the Government of the power of compelling testimony, provided that the immunity granted in exchange for such testimony is as broad as the Fifth Amendment guarantee it replaces. Second, that the immunity so granted need not include immunity against the use of what was otherwise compelled testimony for the purpose of showing that such testimony was perjured at the time given, since, for one thing, the immunity power would be of no practical benefit if the testimony compelled by it were not truthful, and, in any case, *"the immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury."* (222 U.S. at 142; emphasis supplied). In short *Glickstein* held that nothing in the requirement that immunity be as broad

as the Fifth Amendment guarantee against self-incrimination barred the use of perjured testimony given under an immunity statute, since perjured testimony need not be immunized and since the immunity afforded by the constitutional guarantee does not relate to the use of such testimony to show, not what occurred in the past, but what occurred in the very giving of the testimony.

Glickstein then went a step further and asked whether, given the fact that Congress *need* not have barred use of Glickstein's immunized testimony in a future prosecution for the purposes indicated, had Congress nevertheless *chosen* to extend an immunity broader than the Constitutional requirement and, specifically, did the statutory language bar the later use of Glickstein's testimony even though it was perjured and even though it was being offered as evidence of a post-immunity, rather than, pre-immunity act? "In other words, the sole question is, Does the statute, in compelling the giving of testimony, confer an immunity wider than that guaranteed by the Constitution?" (222 U.S. at 142). The Court held not:

> "since the statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, . . . the limited and exclusive meaning which the [defense] contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word." (222 U.S. at 143).

Accordingly, the Supreme Court in *Glickstein* held that, despite the broad wording of the immunity statute, the testimony given by the bankrupt at the immunized bankruptcy proceeding could be introduced against him in the later perjury proceeding.*

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* The *Glickstein* rationale has been specifically applied to former Section 1406 of Title 18, United States Code (under which

[Footnote continued on following page]

The later case on which Judge Bauman relied is *United States* v. *Bryan*, 339 U.S. 323 (1950). Miss Bryan was the secretary of an association under investigation by a Congressional committee. Called before the committee to produce certain records of the association, she stated that the records in question were in her possession but that she would refuse to comply with the committee's request because she had come to the conclusion that its subpoena was not valid. Asked whether the executive board of the association supported her action, she refused to answer on the ground that the question was not pertinent. Subsequently, Miss Bryan was tried for "willful default" in violation of Title 2, United States Code, Section 192 [R.S. § 102]. At trial, the aforementioned testimony was introduced in evidence (apparently on the government's direct case) over a specific objection that such testimony was barred by an automatic immunity provision, Title 18, United States Code, Section 3486 (subsequently repealed), which provided in pertinent part that *"No testimony* given by a witness before . . . any committee of either House . . . shall be used as evidence in *any criminal proceeding* against him in any court, *except* in a prosecution for perjury committed in giving such testimony . . . " [emphasis supplied], (in other words language similar to, but even broader than, the pertinent portions of former Section 1406, set forth below). As the Supreme Court stated, "Admittedly her testimony relative to production of the

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Tramunti received his 1966 immunity) in this Circuit, *United States* v. *Pappadio*, 346 F.2d 5, 8 (2d Cir. 1965, Chief Judge Lumbard), noting (at footnote 3) that "The theory of *Glickstein* is that the Fifth Amendment protects only against self-incrimination with respect to past acts, not with respect to the testimony being given."

Barely a word of Tramunti's brief responds to this "no anticipatory immunity" principle, which Judge Bauman held to be an independently sufficient ground for introduction of Tramunti's 1966 testimony (218a).

For other recent applications of the *Glickstein* doctrine to a variety of situations, see *Robinson* v. *United States*, 401 F.2d 248, 251 (9th Cir. 1968) and cases cited therein.

books comes within the literal language of the [immunity] statute; but the trial court thought that to apply the statute to respondent's testimony would subvert the congressional purpose in its passage. We agree." (339 U.S. at 335).

The Supreme Court then proceeded to give two grounds for its holding. First, that despite the broad wording of the statute excluding use of Congressional testimony and the seeming sole exception for perjury only, immunity does not attach to evasive or contemptuous testimony:

> "Despite the fact that the literal language [of the immunity statute] would encompass testimony elicited by the House Committee in its questioning of the respondent relative to the production of the records of the association, the Court will not reach that result if it is contrary to the congressional intent and leads to absurd conclusions. *United States* v. *Kirby,* 7 Wall. 482, 486 (1869); *Glickstein* v. *United States,* 222 U.S. 139 (1911). And we are clearly of the opinion that the congressional purpose would be frustrated if the words, 'in any criminal proceeding', were read to include a prosecution for willful default under R.S. § 102.
>
> "That purpose was, 'more effectually to enforce the Attendance of Witnesses . . . and to compel them to discover Testimony.' . . . It is now contended that the protection of the statute, which was extended to witnesses in an effort to *obtain* testimony, protects equally the person who willfully *withholds* testimony and is prosecuted for his willful default. This contention completely ignores the purpose of the immunity. In the first place, it imputes to Congress the contradictory and irrational purpose of granting an immunity from prosecution for contempt in order to obtain evidence of that contempt. And in the second place, it assumes that Congress

> had some purpose to compel testimony of the kind here involved—statements of refusal by the witness to answer questions or produce documents—in return for which it was willing to grant an immunity. Such an assumption cannot be made." (339 U.S. at 338-39; emphasis in original.)

Second, *Bryon* held, just as had *Glickstein,* that in any case, immunity does not attach to testimony offered as evidence, not of past criminal acts, but of criminal acts committed in the very giving of the testimony. On this second point, the Court briefly described the history of the immunity statute in question, as well as similar statutes, and then stated:

> "The debates attending enactment of the statutes here in question and the decisions of this and other federal courts construing substantially identical statutes make plain the fact that Congress intended the immunity therein provided to apply only to *past* criminal acts concerning which the witness should be called to testify. . . . There is, in our jurisprudence, no doctrine of 'anticipatory contempt.' While the witness' testimony may show that he has elected to perjure himself or commit contempt, he does not thereby admit his guilt of some past crime about which he has been summoned for questioning but commits the criminal act then and there." (339 U.S. at 340-341; emphasis in original.)*

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* See also *United States* v. *Winter,* 348 F.2d 204, 208-209 (2d Cir., per District Judge Weinfeld), *cert. denied,* 382 U.S. 955 (1965): "It is one thing to say that testimony compelled from a Grand Jury witness who has been denied his right to counsel may not be used to secure his indictment or conviction either for the crimes being investigated or for those [discussed in his testimony]. . . . It is an entirely different proposition, however, to say that such witness may with absolute impunity proceed to perjure himself in the hope of avoiding the return of a True Bill. Such a rule would degrade the oath and have the effect of conferring permanent immunity on the perjurer."

The above principles enunciated by the Supreme Court respecting both the constitutionally permissible limitations on the scope of statutory grants of immunity and the construction of broadly written immunity statutes govern the present case.* Tramunti, pursuant to a grant of immunity, was required to testify to, among other things, his and Dioguardi's prior occupations. Instead of giving the testimony "so compelled" (in terms of section 1406), he purposely evaded his duty and showed contempt for his oath by lying and stating that he could not remember these occupations. When, in the present trial, Tramunti tacitly confirmed the fact that he had lied in 1966 by remembering, in 1973, the prior occupations he had claimed not to remember in 1966, the Government sought to cross-examine him as to his prior "memory lapses" under oath in 1966. The purpose was not to show anything about his or Dioguardi's actual occupations, but to show what Tramunti's intent had been in the very act of giving such false testimony in 1966 in a prior similar situation to the 1971 perjuries he was charged with in the present indictment. Introduction of the 1966 testimony for this purpose falls

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* In Appellant's Brief (pp. 32-3), the sole ground offered for distinguishing *Bryan* is that the witness there never asserted her Fifth Amendment privilege, and so her claim was a statutory, not Constitutional one. Although this is true (only, however, because the statute in question was a so-called "automatic" immunity statute, immediately applicable without any prior claim of privilege), it is a distinction without practical effect, because the immunity statute in *Bryan* was (on its face) even broader than what the Fifth Amendment required and because the Court dealt with Miss Bryan's claim by tracing the history of prior immunity statutes, noting how they had been construed by the Court in prior Constitutional cases, and then concluding—chiefly in reliance on *Glickstein* and *Heike* v. *United States*, 227 U.S. 131 (1913), both Constitutional cases—that despite the broad wording of the statute, Congress had no intention of conferring any benefit beyond that necessary to protect Fifth Amendment rights; in short, the very same analysis that would apply if the Fifth Amendment had been expressly invoked.

directly within the fundamental rationale of both Glickstein and Bryan not to illogically construe immunity statutes to afford protection to testimony given in defiance of, rather than in compliance with, a grant of immunity.

The three Supreme Court dicta on which Tramunti principally relies in an attempt to avoid the direct applicability of the *Glickstein-Bryan* principles are all greatly misconstrued in his brief. Appellant begins by stating (App. Br. p. 20) that "In *Kastigar* v. *United States*, 406 U.S. 441 (1972), the Court held that a total prohibition on use of immunized testimony is required by the Fifth Amendment." But this statement of *Kastigar* begs the present question, which is, whether Tramunti's attempts to avoid giving what the immunity order compelled are themselves immunized. As this Court recently stated in *United States* v. *Dornau*, 491 F.2d 473, 480 n. 13 (2d Cir. 1974), ". . . as we read *Kastigar*, it applies only to *compelled* testimony" (emphasis supplied).

As Judge Bauman so clearly stated below, an attempt to avoid the force of an immunity order through the patent fraud of claiming not to remember even such obvious things as one's own occupations cannot itself be said to be in any meaningful sense testimony which that order "compelled":

> "As the Supreme Court has so often recognized, the purpose of conferring immunity is to elicit truthful albeit incriminating testimony, or, as Justice Holmes stated in *Heike* v. *United States*, 227 U.S. 131 (1913): 'The obvious purpose of the [immunity] statute is to make evidence available and compulsory that otherwise could not be got.' This purpose is not served when an immunized witness proffers perjured or contemptuous testimony; such testimony, as the *Bryan* court noted, is not 'compelled' and therefore cannot be immunized" (221a).

In other words Tramunti was not "compelled . . . to be a witness against himself" within the meaning of the Fifth Amendment. He was compelled by the grant of immunity solely to be a witness against others. In fact he was guaranteed by the immunity grant that he would not be a witness against himself if he gave the truthful and responsive testimony that he had been ordered to give. But if he failed to comply with the order and gave something else—in this case, patently evasive testimony—he did so at his peril.

Kastigar simply upheld as constitutional 18 U.S.C. § 6002, which expressly provides for the use of testimony derived from an immunity situation in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." And that the Court did not regard these as the sole constitutional exceptions to the non-use of testimony given in an immunized setting is shown by the companion case to *Kastigar, Zicarelli* v. *New Jersey Investigation Commission,* 406 U.S. 472 (1972). The New Jersey statute under attack in *Zicarelli* provides that, after a witness testifies under a grant of immunity,

> "he shall be immune from having such *responsive* answer given by him or such *responsive* evidence produced by him, or evidence derived therefrom, used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission. . . ." N.J. Rev. Stat. § 52:9M-17(b) (emphasis supplied).

The appellant in *Zicarelli* attacked this statute on the ground, *inter alia,* that it only immunized responsive testimony and that the term "responsive" was so vague that the

witness therefore testified at his peril, not knowing which of his answers could later be used against him (in *any* proceeding) as being unresponsive. Rejecting this argument, the Supreme Court stated:

> "We perceive no difference between the degree of protection afforded by the New Jersey statute and that afforded by the federal statute sustained in *Kastigar*.
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> * * * * *
>
> . . . The responsiveness limitation is not a trap for the unwary; rather it is a barrier to those who would intentionally tender information not sought in an effort to frustrate and prevent criminal prosecution." (406 U.S. at 475, 477).*

Thus, far from supporting Tramunti's position, *Kastigar* and especially *Zicarelli* reaffirm by implication what was express in *Glickstein* and *Bryan*—that neither the Constitution nor the Congress has required that the benefits of immunity be extended to testimony beyond that which the immunity order is designed to compel, and that the specific references in the statutes to the more obvious limitations on the scope of the immunity conferred are, in Justice Holmes' words in *Heike* v. *United States*, 227 U.S. 131, 141 (1913), ". . . added only from superfluous caution and throw no light on the construction."

The second Supreme Court case to which Tramunti adverts is *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341 (1963). There, the appellant, in response to the Treasury Department's "voluntary disclosure policy" that those who had engaged in black marketing would not be prosecuted for such activities if they voluntarily disclosed their illegal

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* A New York immunity statute containing a similar "responsiveness" provision, CPL § 190.40(2)(b), was recently upheld as Constitutional against a similar attack in *People* v. *Breindel* 342 N.Y.S. 2d 428 (Sup. Ct., N. Y. C. 1973).

profits, had filed a statement confessing black market activities but falsely claiming expenses which reduced the illegal profits. Subsequently, at appellant's trial for tax evasion, both the confession and the false claim were introduced in evidence over a Fifth Amendment claim that the statements were compelled. Upholding the conviction, the Supreme Court held that, first, since the Treasury disclosure policy was voluntary, there was no compulsion in terms of the Fifth Amendment. And, second, even if other Constitutional principles would prevent the Government from reneging on its promise of immunity, the falseness which "permeated" the appellant's disclosures in effect voided the immunity contract with the Government, which was premised on full and honest disclosure.

So far, as Tramunti concedes (App. Br., p. 29), *Shotwell,* to the extent it has any application to the present case, tends to support the Government's position. But Tramunti then draws attention to footnote 10 of the opinion and particularly to the statements that ". . . if an offer of immunity had been specifically directed to petitioners in the context of an investigation, accusation or prosecution . . . [u]nder the rule of *Rogers* v. *Richmond, supra,* the truth or falsity of such a disclosure would then be irrelevant to the question of its admissibility." * Appellant claims that this statement is directly contrary to Judge Bauman's holding that Tramunti's false testimony in 1966 was not entitled to immunity. But, in actual fact, it has nothing to do with the use immunity granted to Tramunti since the footnote, and the *Rogers* case to which it refers [365 U.S. 534 (1960)], both involve questions of *transactional* immunity.** Specifically, the point of the footnote in *Shot-*

* Appellant insists on referring to this language as "holding" (App. Br., p. 29), even though the entire footnote is the clearest of dicta, beginning as it does with the words "A quite different case would be presented if . . ."

** While Section 1406 (set forth below) under which Tramunti was granted immunity in 1966 provides for both transactional

[Footnote continued on following page]

well is that if a taxpayer is given immunity as to a particular tax transaction, the fact that some of his statements about that transaction are false would not permit the Government to prosecute him for that *transaction*. But it by no means follows that the Government could not prosecute him, with respect to the false statements, for perjury or contempt, or (as here) *use* the false statements as evidence of perjurious intent in some other perjury prosecution. If, as Tramunti contends, the *Shotwell* footnote posits a bar to any use of false testimony given in an immunity situation, then clearly it has been overruled by *Kastigar* and the endless other cases upholding prosecutions for perjury or contempt committed in an immunity setting. In short, Tramunti's argument proves too much and gives to this passing footnote a meaning the Court could not have intended.

The final Supreme Court case which Tramunti claims undercuts the principles of *Glickstein* and *Bryan*, namely, *Cameron* v. *United States*, 231 U.S. 710 (1914), need detain us here only because Tramunti so seriously misconstrues it. He argues that *Cameron* condemned the use of false testimony given under a grant of immunity to prove a crime committed after the giving of the testimony, and thereby implicitly overruled or limited *Glickstein*. Judge Bauman rejected this reading of *Cameron*, stating instead that it only proscribed "the government's use of *true* testimony about *prior* events, introduced to demonstrate the truth of the matters asserted therein" (222a-223a; emphasis supplied).

Any fair reading of the *Cameron* case bears out Judge Bauman's construction. Specifically, in *Cameron* there were

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and use immunity, clearly only the use immunity provisions are in question here, since the transactions as to which Tramunti received immunity under Section 1406, and as to which he was questioned in 1966, were (and by the terms of Section 1406 had to be) restricted to narcotics transactions and related tax investigations.

two perjury indictments against the defendant, the first for falsely stating to a bankruptcy commissioner that he (Cameron) had sold eight pianos to William C. Smith prior to filing for bankruptcy, and the second for stating to a bankruptcy referee, in a subsequent but related proceeding, that he had been unable to obtain the address of William C. Smith and had never known Smith's address. The two indictments were consolidated for trial, at which the Government introduced, over objection, immunized testimony from the commissioner proceeding—reprinted at 231 U.S. 721-723—in which Cameron had stated that he knew on what avenue and between what streets Smith lived, that he had known Smith for three or four years, that his brother knew Smith's address, and other such testimony from which the jury, if it believed such testimony were true, could draw the inference that Smith must have been lying in the referee proceeding when he testified that he neither knew Smith's address nor been able to obtain it.

The Court of Appeals upheld the introduction of this testimony on the ground that the immunity statutes applicable to testimony given in bankruptcy proceedings "left unaffected the right to prosecute for perjury and to introduce in support of the charge not only the false statement, but such other parts of the defendant's testimony necessary to make the charge intelligible." *Cameron* v. *United States*, 192 Fed. 548, 550 (2d Cir. 1911).* The Supreme Court agreed with that conclusion as a proper statement of law—indeed, went further and stated that the entire immunized testimony from the commissioner proceeding could be used in the perjury prosecution related to that proceeding "for any legitimate purpose in establishing the charge made." 231 U.S. at 721. But the Supreme Court disagreed that

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* *Accord*: *United States* v. *Hockenberry*, 474 F.2d 247 (3rd Cir. 1973) at 249: "[T]he immunity statute properly permits prosecution for perjury committed in an otherwise immunized statement and also the introduction in evidence of so much of the statement as is essential to establishing the corpus delicti."

in fact the aforementioned testimony in any way tended to establish, clarify, or relate to the perjury charged in the commissioner proceeding, namely the selling of pianos (231 U.S. at 721-22). Rather, the sole real relevance of the aforementioned testimony was to "*contradict* the testimony which he had given before the *referee* and directly tended to establish the charge under *that indictment.*" (231 U.S. at 724; emphasis supplied). This contradiction occurred, of course, only if the jury believed that the testimony introduced from the commissioner proceeding was true, since what it contradicted was the testimony from the referee proceeding which was the subject matter of the second perjury indictment and which the jury found to be false.

In short, what the Supreme Court condemned was the use for its apparent truth of immunized testimony to impeach false statements given by the defendant in a subsequent proceeding even if the prior immunized testimony used for its apparent truth was given in a proceeding in which the witness also gave false testimony.

So much for the Supreme Court dicta cited by Tramunti in opposition to *Glickstein* and *Bryan*. The lower court cases cited fall into the same distinguishable categories. For the most part (e.g., *Hockenberry, supra; Application of Longo,* 280 F. Supp. 185 (S.D.N.Y. 1967), they involve, like *Cameron,* the use of immunized testimony for the truth of its content, not for its falsity. Indeed, as Judge Bauman noted (223a), the Court in *Hockenberry* clearly defined the limits of its holding thus:

> ". . . [A] witness who testifies before a grand jury is required and sworn to tell the truth. The grant of immunity is superimposed upon that requirement. Protection is granted against future injurious use of the incriminating *truth* that the witness is required to speak, not against prosecution for *or the use of* any exculpatory falsehood that he may utter to avoid the required admission of wrongdoing." (474 F.2d at 249; emphasis supplied).

The remaining cases cited by Tramunti (e.g. *People* v. *Allen,* 166 N.W. 2d 664 (Mich. Ct. App. 1969)) involve, like the *Rogers* case cited in the *Shotwell* footnote, illegally obtained confessions, not immunity grants. In the tainted confession cases, the sovereign acts wrongly and illegally. To deter such misbehavior by government agents, an exclusionary rule prohibits the use of improperly obtained statements in certain instances. The exceptions to the rule, however, are significant and instructive.

First, statements violative of *Miranda* but otherwise trustworthy may be used, for their truth, to impeach the credibility of a defendant giving inconsistent testimony at trial. *Harris* v. *New York,* 401 U.S. 222 (1970). Second, where such statements are false, they may still be used as the subject of separate prosecutions based on the fact that they are false. *United States* v. *Winter, supra.* And while even after *Harris* v. *New York,* such false statements obtained in derogation of *Miranda* may not be admissible in evidence at a trial of the charge in connection with which the false statement is made, we know of no authority which would preclude some later use of a perjury conviction for such a false statement (e.g. *Winter*) in impeaching the trial credibility of one so previously convicted. Nor would any deterrent policy be served by precluding the later use, in a wholly unrelated perjury prosecution, of the false statement itself as a prior similar act. It can hardly be argued that government agents, knowing that illegally obtained statements cannot be used to convict a defendant for the crime under investigation, will nevertheless ignore the dictates of *Miranda* in order to obtain false statements (which might be forthcoming in any event after *Miranda* warnings) which have impeachment value only as to some future criminal prosecution of that defendant for a crime of which the agents are then unaware.

Even if false statements obtained in violation of *Miranda* could not be used for any purpose, however, such a rule of law would have no bearing on the question of whether Tramunti's false testimony given under a grant of immunity

was admissible as a similar act and to impeach credibility in an unrelated perjury prosecution. In the present case, unlike the *Miranda* violation cases, there is no initial illegal behavior by the government. Hence no conceivable deterrent policy would be served by reversing the Government's later use of Tramunti's false and evasive testimony. Rather, the only effect would be to reward Tramunti for his deliberate, uncompelled evasions on the stand.

Moreover, the Supreme Court has now made clear that statements, even when otherwise "compelled" in order to exercise Constitutional rights, are not entitled to any Fifth Amendment protection when the statements are willfully false and are later used to demonstrate the declarant's state of mind. *United States* v. *Kahan,* — U.S. — (February 24, 1974; per curiam).* In *Kahan,* a prosecution for (among other things) perjury before the Grand Jury, the Government, on its *direct* case, introduced as "evidence of willfulness in making statements before the grand jury with knowledge of their falsity" (Slip Op. p. 3), Kahan's false statement at his arraignment before a United States Magistrate that he was without funds (and therefore entitled to appointed counsel), over objection from the defense that this statement had been compelled from the defendant in order to secure his Sixth Amendment right to counsel and that it could not therefore be used against him consistent with his Fifth Amendment privilege against self-incrimination. This Court upheld the defense objection and reversed the conviction, 479 F.2d 290 (1973), stating: "The government's claim that the privilege does not extend to false statements is not well taken. The ultimate truth of the matter asserted in the pre-trial request for appointed counsel is of no moment. See *Simmons* v. *United States,* 390 U.S. 377, 393 (1968)." (479 F.2d at 292). But the Supreme Court reversed, per curiam, stating:

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* The Supreme Court's decision in *Kahan* was handed down on February 25, 1974, just two days before Judge Bauman rendered his decision below and hence was unavailable to him when he wrote his opinion.

> "[The] principle [of *Simmons*] cannot be applied to protect respondent here. Simmons barred the use of pre-trial testimony at trial to prove its incriminating content. Here, by contrast the incriminating component of respondent's pretrial statements derives *not from their content,* but from *respondent's knowledge of their falsity.* . . . The protective shield of *Simmons* is not to be converted into a *license for false representations* on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood. Cf. *Harris* v. *New York,* 401 U.S. 222, 226 (1970)." (Slip Op. pp. 4-5; emphasis supplied.)

The rationale of *Kahan* is directly applicable here. The "incriminating component" of Tramunti's Grand Jury testimony as used in the trial below derived not from its content, but from Tramunti's unlawful, evasive, and perjurious intent before the Grand Jury. In short, *Kahan* not only re-emphasizes the well-established principle that false testimony is not compelled within the meaning of the Fifth Amendment, it also expresses the complimentary doctrine recognized since *Glickstein, supra*—that false statements given under a grant of immunity are "not . . . the giving of testimony in the true sense of the word." (222 U.S. at 143).* The later use of such false statements to show the perjurious and contemptuous intent of the witness is thus not violative of his Fifth Amendment privilege. Finally, *Kahan* makes clear that use of the false statements is not restricted by any Constitutional doctrine to a prosecution for making the false statement. They may also be used in other prosecutions where the declarant's state of mind at the time he

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* Tramunti refused to testify; he was then given immunity and ordered to testify, so he pretended not to remember the answers to the questions, even such obvious questions as what he did for a living. In effect, he was verbally thumbing his nose at the Grand Jury and at the Court that ordered him to testify. Such "verbal acts . . . are not protected by the fifth amendment." *United States* v. *Trapnell,* —— F.2d —— (2d Cir., April 10, 1974), Slip Op. at 2878.

made the false statements is relevant and probative of the defendant's intent with respect to the acts being tried.*

B. The Statute

It follows from all that has been said above that Judge Bauman correctly held, on the basis of *Glickstein* and *Bryan*,** that Tramunti's false and evasive answers before the Grand Jury in 1966 were not entitled to immunity protection and that their introduction in the instant trial, not for their truth about past events but to show defendant's perjurious intent at the time he uttered them, did not offend Tramunti's Fifth Amendment rights. But Tramunti contends (App. Br. p. 34 *ff.*) that, even if this is so, the immunity statute pursuant to which he was called upon to testify in 1966 went beyond the Constitution and protected against the later use of even false and contemptuous statements except in prosecutions for perjury and contempt committed in giving such statements, and thus precluded the use to which the Government put Tramunti's statements in the instant trial.

The statute in question, former Section 1406 of Title 18, United States Code, provided:

> "§ 1406. Immunity of witnesses
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> Whenever in the judgment of a United States attorney the testimony of any witness, or the produc-

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* This is made explicit in the separate opinion of Justice Marshall in *Kahan* (Slip Op. pp. 8-10), where he agrees with the majority that "the immunity provided by the Fifth Amendment" does not extend to perjurious testimony and that "In view of its concession that the defendant can be penalized for wilfully and knowingly falsifying [otherwise immunized testimony], I cannot understand the Court of Appeals' conclusion that this sanction can only take the form of a separate prosecution for perjury." Marshall dissents, however, from the majority, because he believes the trial court did not make a sufficient finding that the testimony in question was wilfully false. Here, by contrast, Judge Bauman expressly found that the statements were patently, evasively false (225a).

** As noted, the *Kahan* case, decided approximately at the same time Judge Bauman filed his opinion in this case, squarely confirms his position.

tion of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a),

is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so *compelled* be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section. Added July 18, 1956, c. 629, Title II, § 201. 70 Stat. 574." (emphasis supplied).

Appellant, citing dicta from *United States* v. *Great Northern Railway Co.*, 343 U.S. 562, 575 (1952) (a civil

case involving the setting of rates under the Interstate Commerce Act), to the effect that the court is bound "to apply statutes on the basis of what Congress has written, not what Congress might have written," proffers a wooden interpretation of this statute to the effect that the final sentence of section 1406 necessarily excludes all other remedies for, or use of, testimony given in noncompliance with the immunity order.* But Judge Bauman rejected this argument, on two independent grounds. First, as already discussed, he found that Tramunti's false and evasive testimony was by those very facts, not "compelled" in the sense that the statute (and the Fifth Amendment) uses that term (221a). Not falling within the terms of the statute to begin with, it could hardly be entitled to its benefits, whatever their scope. Second, he found, after examining the appropriate case and legislative history (218a-221a), that the final sentence of Section 1406, "by singling out these two, has done no more than enumerate the more obvious situations where immunity would not apply," and was not intended to be an exclusionary clause. Or, as stated by Justice Holmes in *Heike, supra,* the exceptive provisions were added only from "superfluous caution and throw no light on the construction."

First, as to legislative history, section 1406 was passed in 1956 as part of the Narcotic Control Act of 1956 (Title 18, United States Code, Sections 1401 *et seq.*), of which the Supreme Court later said: "The whole array of aids adopted in 1956, of which immunity is but one, was especially designed to 'permit enforcement officers to operate more

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* Like most arguments that rely on a mechanical literalness, rather than underlying purpose, to interpret a statute, the argument proves too much, since one can immediately think of a dozen examples to disprove it. For example, if an immunized witness was asked "Is this the gun you shot your wife with?" and he replied "No, but it's the gun I'm going to use to shoot you if you don't stop prosecuting me," is there any question that his statement would be admissible to show intent in his subsequent trial for threatening the prosecutor? That is because it is offered, not for what it says about the pre-immunity event (the "No" part) but about the post-immunity event.

effectively.'" *Reina* v. *United States*, 364 U.S. 507, 12 (1960). The language of section 1406 itself was copied from the Immunity Act of 1954, an act drafted in an attempt to write an immunity statute that, while broad enough to survive any Constitutional challenge, would not be any broader than Constitutionally necessary so as to unintentionally confer a "gratuity" or "immunity bath" on immunized witnesses. As the House Report on the bill stated: ". . . much has been said of the so called 'immunity bath' [conferred] by the mere fact of testifying. That such an evil must be avoided at all costs is self-evident." (1954 *U.S.C. Congressional and Administrative News* at 3064.)* While there is no more specific mention of the perjury and contempt exemption clause with which we are here concerned, these comments at least argue that Congress had no purpose to provide a kind of gratuity to a perjurious or contumacious witness by providing any immunity ban on the use of his testimony other than that constitutionally required.

Additionally, the particular language of the exemption clause at the end of Section 1406 is actually the product of the interplay of Congressional drafting, judicial interpretation, and Congressional re-drafting, over a long series of immunity acts.** The very earliest immunity statutes, such as the one construed in the *Glickstein* case, *supra*, contained on their face no exception, even for perjured testimony, to the immunity bar to future use of testimony in criminal proceedings against the witness. Thus, these early acts, while found constitutional, were so broad as to enable a

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* The legislative history of the Immunity Act of 1954 is set forth in 1954 *U.S.C. Congressional and Administrative News* 3059 (83rd Congress, 2d Session, 1954).

** The fullest account of the history of federal immunity statutes from their beginnings in 1857 up to 1968 is Robert G. Dixon, Jr., "Comment on Immunity Provision," in 2 Working Papers of the National Commission on the Reform of Federal Criminal Laws 1405 (1968) (hereinafter "*Dixon*"). See also the legislative history of the Organized Crime Control Act of 1969, especially the report on the Act of the Senate Judiciary Committee, Senate Report 91-617 (1969).

truthful witness to gain an "immunity bath" simply by testifying to all the wrongdoing he ever had committed (or arguably, until *Glickstein,* ever would commit). The response was that, while not repealing all the old immunity acts, Congress enacted several new ones, limiting immunity to specific kinds of investigations, and inserting, in some cases, the provision: "that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." *

This development gave rise to the defense argument that one could not be prosecuted for perjury arising out of testimony given pursuant to one of the older immunity statutes. This was said to be so not only because such older statute on its face said that such testimony should not be used in any criminal proceeding bar none, but also because Congress had expressly added a perjury exception to the later immunity statutes, thus implicitly recognizing that such exception to immunity did not exist under the former statutes. But the Supreme Court in *Glickstein* rejected this argument, stating:

> "The argument that because the section does not contain an expression of the reservation of a right to prosecute for perjury in harmony with the reservations in [later immunity statutes], therefore it is to be presumed that it was intended that no such right should exist, we think, simply begs the question for decision, since it is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given with impunity in the absence of the most express and specific command to that effect."
>
> "Bearing in mind the subject dealt with *we think the reservation of the right to prosecute for perjury*

* E.g. the Immunity Act of 1893, 27 Stat. 443, which, after being held constitutional in *Brown* v. *Walker,* 161 U.S. 591 (1896) became the basic model for all later immunity acts until 1960—see *Dixon* at 1409 *ff.*

> *made in the [later] statutes to which we have referred was but the manifestation of abundant caution,* and hence the absence of such reservation in the statute under consideration may not be taken as indicative of an intention on the part of Congress that perjury might be committed at pleasure." (222 U.S. 143-44; emphasis supplied.)

Despite these clear statements from the Supreme Court in *Glickstein* (and *Heike*), it was practically inevitable that sooner or later someone would raise the (converse) argument that Congress must have intended perjury as the sole and exclusive exception (or remedy), or why would it have singled it out? This argument was, however, made to the Supreme Court by the defendant in the *Bryan* case, *supra,* who was prosecuted for willful default based on testimony she had given under an immunity statute with an exception only for perjury. In rejecting this argument the Court stated:

> "The same reasons that led this Court to conclude that the clause excepting a prosecution for perjury from the reach of another immunity statute 'was added only from superfluous caution and throws no light on the construction,' [citing *Heike*], lead us to hold that Congress did not intend the term 'any criminal proceeding,' to encompass a prosecution of the witness for wilful default under R.S. § 102. A contrary view would simply encourage the refusal of witnesses to answer questions or produce papers, quite contrary to the purpose of the statute." (339 U.S. at 342-43).*

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* Similarly, the Court in *Bryan* quoted Judge Learned Hand with approval, to the following effect:

> " 'The question is no less than whether courts must put up with shifts and subterfuges in the place of truth and are powerless to put an end to trifling. They would prove themselves incapable of dealing with actualities if it were so, for there is no surer sign of a feeble and fumbling law

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The dissent in *Bryan* shows even more clearly that the Court in *Bryan* had before it, and rejected, the same defense argument here advanced. For it argues (339 U.S. at 346) that the language of the immunity statutes on their face show that Congress, in enacting the statutes, had before it the question of what kinds of criminal proceedings, if any, could be a proper forum for the use of testimony given under the immunity grant ("The statutory exception of 'prosecution for perjury' shows that the attention of Congress was focused on whether committee testimony should be admissible in any special type of criminal prosecution"), and that Congress concluded that the only appropriate such proceeding was a perjury one. The Court's rejection of the dissent's view suggests it found no warrant for this interpretation either in the legislative history or in sound policy.

Following the *Bryan* decision Congress again exercised that "abundance of caution" that had led to the addition of the perjury exception by adding a contempt exception as well, both in the Immunity Act of 1954 and in the Narcotics Control Act of 1956 (Section 1406). Congress' obvious (if somewhat fumbling) purpose was to make sure that the earlier omission of an express exception for contempt, which had led the *Bryan* problem to be raised (although satisfactorily resolved), would not be repeated in future enactments.

As this brief historical survey indicates, nothing in this addition of contempt to the prior sole exception for perjury was intended to indicate that these two were the exclusive

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than timidity in penetrating the form to the substance.'" — 323 U.S. at 334-35.

The *form* of Tramunti's 1966 testimony was immunity-ordered responses to questions about prior occupations; the *substance* was an evasive refusal to give responses under the guise of a pretended lapse of memory. Congress never intended that he should have any immunity for *that*.

permissible uses of testimony given in defiance of an immunity grant, any more than the prior exception just for perjury prosecutions had been.

Overall, the evidence is substantial that Congress intended, in every immunity statute, to do no more than provide the prosecutor with a tool for getting evidence otherwise inaccessible because of the Fifth Amendment, and to this end sought to grant immunity only so far as required by the Fifth Amendment, and no further. The Supreme Court enforced this policy, on a case-by-case basis. Since perjured or contemptuous testimony continued to prevent the prosecution from getting the truthful evidence sought, it was not to be considered immunized. Congress, over time, codified the more obvious situations where immunity would not apply but at no time evinced an intent or purpose to make these exceptions exclusive. It continues to be the task of the courts to determine whether sound considerations of public policy require the recognition of additional, implicit exceptions to prevent someone such as Tramunti from reaping a wholly unintended benefit from blatantly perjurious testimony given in utter defiance of the immunity granted to him.

It has been clearly stated that the object of Section 1406 is to obtain truthful albeit incriminating testimony from witnesses and that the giving of perjured or contumacious testimony instead violates this purpose and does not entitle one to immunity. Thus, in *United States* v. *Pappaddio,* 235 F. Supp. 887 (S.D.N.Y. 1964), *aff'd,* 346 F.2d 5 (2d Cir. 1965), Judge Herlands stated:

> "Under Title 18, U.S.C. Section 1406, the immunity statute, the Government has the right to obtain truthful testimony from the witness. That is the objective of the provision that excludes the witness's perjury, if any, from the immunizing effect of the statute.

> "The immunity statute does not create an opportunity for a witness to effect an illusory exchange of real immunity in return for false testimony. There must be a bargain equivalent whereby the government obtains the truth in exchange for its granting immunity." (235 F. Supp. at 890).

There having been no fair compliance by Tramunti with the terms of Section 1406, he can hardly claim its benefits.

C. The Use of the Testimony as a Prior Similar Act and to Impeach Credibility

Judge Bauman (224a) rightly rejected appellant's further contention (raised again here at p. 37 of Appellant's Brief) that permitting the Government to introduce former immunized testimony for its falsity after only a preliminary determination of such falsity by a judge (rather than a jury) denied appellant due process. Insofar as Tramunti is making an argument concerning the admissibility of similar act testimony, his position is without legal foundaiton. We know of no authority which limits proof of prior or subsequent similar acts to acts which have already resulted in a conviction or have been determined beyond a reasonable doubt. Indeed the case law in this Circuit is unmistakably to the contrary. See *e.g., United States* v. *Nathan,* 476 F.2d 456, 460 (2d Cir. 1973).

To the extent that Tramunti is arguing that the 1966 Grand Jury testimony might have been considered true by the trial jury below and as such might have been considered by the jury as impeaching by its truth the credibility of his inconsistent trial testimony in contravention of *Cameron, supra,* his argument is frivolous. The 1966 statements were patently false and evasive on their face—what Judge Bauman at the post-trial hearing on January 30, 1974 called "the typical 'I don't remember' contempt situation, the deliberate evasion of answering questions by 'I don't remem-

ber' rather than ,ust plain not answering" (Hearing transcript, p. 7). By no conceivable stretch of the imagination can it be said that his finding of falsity (224a) was "wholly unsupported by evidence." *United States* v. *Pfingst*, 490 F.2d 262, 273 n. 11 (2d Cir. 1973).

D. The Absence of Proper Objection

Judge Bauman, in addition to finding the Government's introduction of the 1966 testimony perfectly proper, held that, even assuming *arguendo* there had been any error in such introduction, in the absence at trial of defense objection (except on the ground of remoteness), the rule of *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966), applied and the error would be noticed only if it were plain error inflicting serious injustice. Having been in a position to observe the entire proceedings and the prejudicial effect (if any) of the Government's use of the 1966 testimony, he concluded that "I cannot find that this use amounted to an injustice of sufficient magnitude to warrant invocation of the plain error rule" (216a).*

Tramunti now challenges this finding. While conceding that the Government did not act in bad faith in failing to disclose (what was then unknown to Government counsel) that the 1966 testimony had been given in an immunity situation, Tramunti contends (App. Br. 22-27) that since

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* The use of the 1966 testimony hardly constituted all of the cross-examination of Tramunti. He was thoroughly cross-examined about prior false statements made to Assistant United States Attorney Wing in 1973 and at trial in 1971, as well as about the credibility from a factual point of view of his 1971 denials constituting the indictment. The Government presented overwhelming evidence of Tramunti's guilt in its direct case. That the jury was more concerned with the Government's proof than with Tramunti's tales may be gleaned from the jury's sole note, which requested the testimony of Michael Hellerman and Marianne Hellerman.

defense counsel did not know of this fact either, the failure to object cannot support an application of the rule of *Indiviglio.**

If defense counsel's actual knowledge during trial were the test of whether to apply the rule of *Indiviglio,* then the rule could never be applied without an evidentiary hearing. But *Indiviglio* does not stand for such a frail proposition. Rather, it, and the "plain error" doctrine which it specifies, rest on the realization that no trial can ever be perfect, that both Government and defense will inevitably, in every trial, innocently overlook important questions or fail to pursue inquiries that might well be significant. Where such matters are not overlooked and objections are timely made, then the trial court has a chance to rule before the evidence is introduced and the trial proceeds. Where, however, the matters have been plainly overlooked by court and counsel, *and* the prejudice to defendant is so substantial as to render the entire trial fundamentally unfair, then, but only then, is the drastic remedy of upsetting the verdict and going through an entire new trial required. It is these objective questions, and not any subjective question of what was known to counsel for either side (except where bad faith is involved), that underlie the invocation of *Indiviglio.*

Moreover, in this present case, while the Government might have probed more exhaustively in advance into whether Tramunti's 1966 testimony had been given only after the granting of an immunity order by a District Court (something not apparent from the face of the 1966 transcript and first brought to the attention of the Government by defense counsel following the trial), any fair weighing of the equities must accord even greater negligence to Tramunti and his defense counsel for not raising the matter sooner. The person obviously in the best position to know

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* Without exception, the cases relied on by appellant in opposition to Judge Bauman's *Indiviglio* finding either antedate *Indiviglio* or come from other Circuits.

whether the testimony was given under an immunity grant was the defendant himself. Had defense counsel—counsel of unquestioned experience and skill—taken even the rudimentary precaution of asking the Government in advance for all of defendant's Rule 16 statements, defense counsel would have had the 1966 statements before him in ample time to explore with defendant all legal objections to their admissibility. Defense counsel cannot place on the Government the burden of any waiver resulting from defense counsel's own failure to exercise due diligence.

Applying the *Indiviglio* doctrine to a failure to object to the introduction of evidence allegedly derived from an unconstitutional wiretap, this Court recently stated that ". . . even in the exercise of our discretionary powers to notice 'plain error,' we do not think that we should deal with these issues now . . . [They] are 'at least sufficiently close' to take [them] out of the realm of plain error. *United States* v. *Manning*, 448 F.2d 992, 1002 (2d Cir.), *cert. denied*, 404 U.S. 995 (1971)." *United States* v. *Wright*, 466 F.2d 1256, 1259 (2d Cir. 1972). Here, if the testimony were in fact protected by the grant of immunity at all, the question was surely sufficiently close that its use without objection in the context of this case did not under any circumstances constitute plain error.

In short, Tramunti's patently false evasions in 1966 were not entitled to immunity and were properly introduced at the present trial to impeach Tramunti and show his intent and wilfulness. But even assuming *arguendo* that they were improperly introduced, such introduction was not, in the context of this case, plain error warranting reversal.

POINT II

Tramunti's acquittal in the Imperial case did not in any respect bar his instant conviction for making false statements at that trial.

Prior to the instant trial, defendant Tramunti moved to dismiss the indictment on the ground that prosecution on every count was barred by "double jeopardy, collateral estoppel and res judicata," in that Tramunti had been acquitted at the trial of Indictment 70 Cr. 967 (the "Imperial trial") and that, in so acquitting, the jury had *necessarily* determined the truth of the very statements Tramunti was now charged with having made falsely. After the filing of briefs and extensive oral argument, Judge Bauman rejected this argument and denied the motion. Thereafter, on August 24, 1973, this Court denied without opinion defendant's application for a writ of prohibition based on the same theory.*

At the end of the Government's case below, Tramunti's trial counsel renewed "the motions heretofore made by the predecessor attorney claiming collateral estoppel" (Tr. 529). The motions were again denied, and correctly so.

The applicable Constitutional standards may be briefly stated: Incorporated in the Constitutional guarantee against double jeopardy is the doctrine of collateral estoppel: "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future [prosecution]". *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). But nothing in this doctrine purports to bar every future prosecution bearing some relation to some past one. To the

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* *Tramunti* v. *Bauman*, Dkt. No. 73-2128. A subsequent petition to the Supreme Court for a writ of certiorari was similarly denied. *Tramunti* v. *Bauman*, Supreme Ct. Dkt. No. 73-603.

contrary, the burden is upon the defendant * to show with certainty that the jury's verdict at the prior trial necessarily decided the issues presented by the later prosecution. Since a jury typically renders a general verdict, "'(t)he defense of collateral estoppel will not often be available to a criminal defendant . . . because it is not often possible to determine with precision how the judge or jury has decided any particular issue.'" *United States* v. *Cioffi*, 487 F.2d 492, 498 n. 8 (2d Cir. 1973), quoting with approval Justice Schaefer of the Illinois Supreme Court.

The test, as laid down by the Supreme Court, is that: "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude *whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.*" *Ashe* v. *Swenson, supra*, 397 U.S. at 444, quoting with approval 74 Harv. L. Rev. 38-39 (emphasis supplied); *United States* v. *Zane*, Dkt. Nos. 73-2401, 73-2450 (2d Cir., April 1, 1974), Slip Op. at 2504-05; *United States* v. *Gremillion*, 464 F.2d 901, 906 (5th Cir. 1972). Thus, in the case at bar, in order to prevail, Tramunti must establish that by applying this analysis it is possible to "determine with certainty" (*Cioffi, supra*) that the jury in the Imperial trial *necessarily* decided all of the following: That he had never met or known Michael Hellerman (Count 1); that he had never met or known John Kelsey (Count 2); that he had never met or known Murray Taylor (Count 3); that he had never met or known Vincent Gugliaro

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* *United States* v. *Friedland*, 391 F.2d 378, 382 (2d Cir. 1968); *United States* v. *Feinberg*, 383 F.2d 60, 70 (2d Cir. 1967).

(Count 4); that he had never met or known Philip Bonadonna (Count 5); and that he had never attended a luncheon at Gatsby's in November, 1969 with John Dioguardi, Kelsey, and others (Count 6). There is nothing in the record of the Imperial trial to indicate that the jury there necessarily decided any of these issues, let alone all of them.

The Imperial Indictment charged 16 defendants and 12 other co-conspirators with an intricate and far-flung conspiracy to manipulate securities, commit mail and wire fraud and travel in interstate commerce to promote extortion. Tramunti was acquitted at the first Imperial trial, involving ten of the defendants. At that trial, the Government's proof of Tramunti's knowing participation in the scheme was highly inferential. Essentially it consisted of the testimony of Murray Taylor and John Kelsey (out of a total of more than 60 witnesses at the overall trial) that Tramunti was present at a luncheon at Gatsby's Restaurant at which putting up "front money" for the Imperial scheme was discussed. Taking the Government's proof at its best, all Tramunti did at the luncheon was nod his head and according to Taylor, possibly say "No, there will be no front money."

On this skimpy record, the jury could have found that Tramunti knew, or at least had met, all the persons he denied knowing and meeting and even could have found that he knew about the stock manipulation scheme—they could have found all this and still have found that he had not associated himself with the scheme and hence was not guilty of the conspiracy. Or, to put it another way, the jury could have determined that it was entirely irrelevant to consider whether Tramunti knew the dramatis personnae, had met with them in Gatsby's, or had even heard them discuss the scheme, since, taking the Government's proof at its strongest, it failed to show conspiratorial intent beyond a reasonable doubt.

This is no mere speculation as to how the jury might have viewed the evidence; it is, rather, one of the primary ways Tramunti's attorney at the Imperial trial told the jury they should view the record. Defense counsel began his summation by noting that "the only evidence against Tramunti is Taylor and Kelsey. That brings us down to Gatsby's luncheon." (Imperial transcript p. 6537). He then discussed each of their testimony, beginning with Taylor:

> "All right. What did he [Taylor] say about Mr. Tramunti at this meeting [at Gatsby's]? That Mr. Tramunti said, turning to Mr. Gugliaro, 'No, there will be no front money.' What does that mean, if we accept Mr. Taylor's testimony that Mr. Tramunti said this? By the way, I think that is the only testimony of anybody in this case attributing words in the mouth of Mr. Tramunti, the only testimony, because he sort of changed it on cross. Does that mean that Mr. Tramunti is going into a scheme or he is telling whoever is present—and this assumes that there was such a meeting—'No, there will be no front money,' or is he disassociating himself from the scheme, because you never hear from him again, never again." (Imperial Transcript 6548-49).

And then, referring to the other principal Government witness implicating Tramunti, John Kelsey, defense counsel, argued:

> "What did Mr. Kelsey say Mr. Tramunti said at this luncheon meeting [at Gatsby's]? He didn't say anything. He answered a question or two and nodded his head. What questions did he answer? To what did he nod his head?" (Imperial Transcript p. 6551).

Next, defense counsel reminded the jury (repeatedly) that, even if Tramunti in fact knew or had met with some of the conspirators, that by itself was not proof of his participation in the conspiracy:

> "'You give a dog a bad name and you hang him for it.' And is that what you have here? Guilt by insinuation, by insidious insinuation?" (Imperial Transcript, p. 6553).
>
> "And Justice Jackson once said that the role of a defendant in a conspiracy case is very difficult because there will usually be evidence of wrongdoing and jurors are apt to believe that birds of a feather are flocked together, even when just seated at a table in a courtroom, and that you may assume guilt by association which we tell you you are not to do." (Imperial Transcript p. 6559).

Defense counsel was also careful to argue to the jury that, even if they disbelieved Tramunti's testimony that he did not know the various co-conspirators, they should not on that account assume the opposite and convict Tramunti:

> "Mr. Tramunti's defense is, and you heard him testify, that he has nothing to do with this, . . . has no business connections with any of these people, doesn't know any of them. I ran through all the names, every name, including the co-conspirators. . . . Now, in his case, and I suppose the government can say this with respect to other defendants that took the stand, don't believe their denials, and thereby through some reverse psychology you assume the truth of the allegations against them. That is supposed to be the substitute for proof. You see, there is a law that false exculpatory evidence can be the basis of an inference contrary, not necessarily of guilt, but contrary to what the person is saying. We don't have it in this case." (Imperial Transcript p. 6556).

Finally, Tramunti's counsel summed up this entire line of argument, and his summation, by stating:

> ". . . [Tramunti] had no part in this case, and I submit to you that there is no evidence that he did,

> and *even taking the government's evidence at its best, he emerged once and is never heard of again in the case.*" (Imperial Transcript p. 6561; emphasis supplied).

In short, Tramunti's own counsel repeatedly suggested to the jury that they need not reach the point of weighing Tramunti's own testimony that he did not know the various co-conspirators or know about the conspiracy, because even taking the Government's proof at face value, it was too flimsy to warrant conviction.

Defense counsel's emphasis was then confirmed to the jury in the charge given by the trial court. Summarizing what he regarded as Tramunti's position, the trial judge spent three pages discussing the weaknesses in the Government's proof and barely a sentence discussing the Tramunti statements that form the basis of the perjury counts here. (See Imperial Transcript, pp. 7042-44). Moreover, in charging the law to the jury, the trial court began by emphasizing (Imperial Transcript p. 6970) and re-emphasizing (Imperial Transcript p. 6980) that there is no such thing as guilt by association. He then charged them that, if they found that the conspiracy charged in the indictment came into existence, then they must next consider whether any particular defendant became a member of the conspiracy:

> "It is important for you to understand that mere association of a defendant with an alleged co-conspirator does not establish his participation in the conspiracy, even if you find that there was a conspiracy. So, too, mere knowledge by a defendant of a conspiracy or any illegal act on the part of an alleged co-conspirator, that is, any knowledge of somebody that another person is doing something illegal, that mere knowledge is not sufficient to establish membership in the conspiracy. To find any particular defendant, that is, any given defendant

guilty of conspiracy, you must find that that defendant knowingly and wilfully joined the conspiracy with the specific intent and purpose of furthering its objective. The question is one of intent, and that is one of fact, and that is for you to decide." (Imperial Transcript p. 7003).

Given this approach by both defense counsel and trial court, there was no reason for the jury to consider whether or not Tramunti knew the various co-conspirators, or even had met with some of them in Gatsby's, in order to acquit.* Certainly it cannot be said that, in the context of this case, the jury necessarily decided those facts.

Additionally, there are other possible ways in which the jury may have determined to acquit Tramunti without ever deciding whether he had met with the co-conspirators or had had lunch at Gatsby's; or, indeed, even despite deciding that he had lied in his denials of these events. For example, the Government proceeded on what may be called an "iceberg" theory of the conspiracy: There was a clearly visible portion consisting of persons like Hellerman, Kelsey, Alpert and Weiss who performed the substantive crimes, and an alleged hidden base consisting of non-brokers who allegedly oversaw and underwrote the conspiracy. As the conspiracy expanded and became more complicated, more and more of the "bosses" at the base of the iceberg began to play a role. At the very bottom of the base was allegedly Tramunti, who was the "boss" or "partner" of John Dioguardi, who in turn was the "boss" of Michael Hellerman, who in turn gave directions to Kelsey, Weiss, etc.

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* Similarly, to the extent that the jury ever focused on Tramunti's possible role as an aider and abettor, they were not required to determine whether or not he had been present at the commission of a crime but only whether, assuming he had been present, there was proof he had aided the commission. See *United States* v. *Williams*, 341 U.S. 58 (1951) at n. 4 (and cases there cited).

Since the jury acquitted the defendants who formed the link between Tramunti and the visible manipulators, the same failure of proof that led the jury to acquit or disagree as to all but two of the other defendants * may well have led it to acquit Tramunti, without ever reaching the question of his credibility or whom he knew and had met with.**

For example, it may well be that the jury was unimpressed with the quality of the Government's evidence of Dioguardi's role in the charged conspiracy—proof that was strongly challenged by many of the defendants. (In a subsequent trial on the same indictment all remaining de-

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* The two convicted—Alpert and Weiss—were the two as to whom the Government had proof that went beyond meetings and conversations to substantive manipulations.

** The present issue, let it be re-emphasized, is not whether a jury by its verdict has determined that a defendant has testified truthfully and is therefore innocent of the charge of perjury, but whether a perjury prosecution would require relitigation of specific fact issues which have already been determined favorably to the defendant. *Adams* v. *United States*, 287 F.2d 701, 703 (5th Cir. 1961). See also, Note, Perjury by Defendants: The Uses of Double Jeopardy and Collateral Estoppel, 74 Harvard L. Rev. 752, 763 (1961). For example, at the Imperial trial, Taylor testified that Tramunti met Hellerman at Gatsby's and Kelsey testified that Tramunti met Hellerman at the Americana; even if the jury disbelieved them and believed Tramunti, at the very most they decided that neither of these meetings occurred. But Tramunti, in his testimony, had gone farther and denied that he knew Hellerman at all—an obviously material denial since Hellerman was at the very center of the alleged conspiracy. It is only in the present trial that this broader denial was put in issue (Count 1), by Hellerman (who had taken the Fifth Amendment at the Imperial trial) now testifying that he met Tramunti on no less than five specific occasions never the subject of the Imperial trial—the wedding of Joe Columbo, Jr., at the Pussycat Lounge, at John Dioguardi's office, at McCarthy's Steak House, and just prior to the Imperial trial. Also, at the present trial, all but one of these specific instances was corroborated by some other witness (unknown or unavailable to the Government at the time of the Imperial trial), respectively, Joseph Barone, Bruce Bazzi, Gilbert Dragani, and Marianne Hellerman.

fendants, including Dioguardi, were acquitted on all counts.) If, as seems plausible, the jury found insufficient evidence to link Dioguardi with the conspiracy, how could it not find Tramunti innocent, regardless of the credibility of his testimony, when the Government's theory was that Tramunti was brought into the conspiracy through Dioguardi?

Still another ground for the jury's verdict which was not dependent on determining the factual issues forming the basis of the present perjury indictment was the issue of multiple conspiracies. Tramunti's lawyer argued in summation that there were four separate conspiracies and that Tramunti was not a part of any overall manipulative scheme (Imperial Transcript pp. 6528-6532). This argument was reinforced by the fact that the only persons who testified against Tramunti—Taylor and Kelsey—were themselves latecomers to the overall scheme charged in the indictment. Finally, the argument was strengthened still further by the trial court's charge on multiple conspiracy (Imperial Transcript pp. 7009-7010). Cf. *Sealfon* v. *United States*, 332 U.S. 575, 579-80 (1948) (absence of jury instructions on alternative theories of conspiracy precluded government's argument that prior trial had not determined the issue presented at second trial).

In sum, the Government submits, the present case is controlled by *United States* v. *Williams*, 341 U.S. 58 (1951). In *Williams*, three defendants challenged on res judicata grounds their perjury convictions arising from their testimony at their former trial for beating prisoners, conspiring to beat prisoners, and aiding and abetting the beating of prisoners. At that trial, they had been acquitted of the substantive and aiding and abetting counts and there was a jury disagreement on the conspiracy counts. The Supreme Court held that no res judicata operated to bar their perjury convictions, since the perjured testimony was that they had not *seen* a fourth defendant, Williams, beating the prisoners: "An acquittal of [beating the prisoners] or of aiding and abetting was certainly not a determination that [the

three defendants] did not see Williams assaulting the prisoners." (341 U.S. at 65).*

Similarly here, when the jury acquitted Tramunti of the various frauds, aiding and abetting, and conspiracy, that was certainly not a determination that Tramunti did not meet the co-conspirators or even observe some of their fraudulent activity, and a perjury prosecution for Tramunti's denials of these meetings is still very much in order. See, e.g., *United States* v. *Cioffi, supra* (2d Cir. 1973); *United States* v. *Haines,* 485 F.2d 564 (7th Cir. 1973) (prior acquittal no bar to § 1623 prosecution, since jury could have discredited defendant's false testimony concerning his whereabouts at time of offense and still conclude that the Government had not established his guilt); *United States* v. *Gremillion,* 464 F.2d 901 (5th Cir. 1972) (acquittal of securities fraud, mail fraud and conspiracy no bar to perjury prosecution for false testimony before Grand Jury); *Adams* v. *United States,* 287 F.2d 701, 703 (5th Cir. 1961) (acquittal of transporting and possessing moonshine whiskey held no bar to perjury prosecution related to defendant's alibi); and *cf. United States* v. *Manfredonia,* 414 F.2d 760, 764 (2d Cir. 1969).**

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* Appellant's Brief, at page 46, attempts to distinguish *Williams* by stating: "In *Williams*, the Court held that while indictment for perjury was not barred by an acquittal at a prior trial, the doctrine was available if, after trial and under the *Sealfon* test, acquittal on the substantive charge necessarily determined the matters in issue even though the offenses were different." No such statement, or anything remotely like it, appears in the *Williams* opinion. Moreover, neither Tramunti's trial counsel, in renewing the collateral estoppel motion at the end of the Government's case in the instant trial, nor Appellant's brief here, suggest that the facts and issues on which Tramunti relied in making his collateral estoppel motions were in any way different before or after the introduction of the Government's proof in the present case.

** Appellant's reliance on *Harris* v. *Washington,* 404 U.S. 55 (1971) is misplaced. In *Harris,* the Government conceded that

[Footnote continued on following page]

POINT III

There was sufficient evidence from which the jury could infer that defendant lied when he testified that he did not know and had not seen Vincent Gugliaro prior to 1971.

Appellant attacks the sufficiency of the evidence respecting Count Four of the Indictment, in which Tramunti was charged with making false statements when he testified in 1971 that he did not know Vincent Gugliaro and could not recall even having seen him prior to the Imperial trial. Of course, it is the province of the jury to weigh the evidence and draw justifiable inferences of fact, and, in the present posture, such evidence and inferences must be considered in the light most favorable to the Government. *United States* v. *Zanfardino*, — F.2d — (2d Cir., April 26, 1974), Slip Op. at 3052; *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973); *United States* v. *Barash*, 412 F.2d 26, 31 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969); *United States* v. *Aiken*, 373 F.2d 294, 296 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967).

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the same factual issue would be relitigated at defendant's second trial as had been litigated at the first, and thus the Court properly held that collateral estoppel barred the second prosecution. As for the three lower court cases on which Appellant relies—*Ehrlich* v. *United States*, 145 F.2d 693 (5th Cir. 1944) (distinguished by the Supreme Court in *Williams*, *supra*); *United States* v. *Nash*, 447 F.2d 1382 (4th Cir. 1971); and *United States* v. *Drevetzki*, 338 F. Supp. 403 (N.D. Ill. 1972)—each involved a situation where the Court found that the factual issue on which the collateral estoppel was invoked must *necessarily* have been decided in order to reach the prior verdict. In fact, in all three of the cases, if the factual issue in dispute was resolved one way the Government almost certainly would win, if it was resolved the other way, the defendant almost certainly would win, for it was the critical issue in conflict or directly controlled by such issue.

In the instant trial, the Government introduced a photograph (Government Exhibit 4) showing three couples exiting, in close proximity, from the door of Claridge Caterers in Brooklyn following the wedding of the daughter of Richard Fusco in 1965. The male member of the lead couple is Carmine Tramunti; directly behind him is a second couple, of whom the male member is Vincent Gugliaro (Tr. 401-402). All four appear to be engaged in listening to some fifth party not shown on the photograph.

On his direct examination, Tramunti repeated the denials contained in Count 4 of the Indictment. When asked, on direct, whether he had even been at the Fusco wedding at all, he hedged with "I might have been" (Tr. 612). But a moment later, when asked (still on direct) how many people were at the Fusco wedding, he stated flatly "I would say a few hundred" (Tr. 613).

On cross-examination, Tramunti now definitely remembered that he had attended the Fusco wedding at Claridge Caterers, and he confirmed that the photo pictured himself and Mr. Gugliaro. He was then confronted with his related testimony in the Imperial Trial in which he had testified that he could not recall ever having been to Claridge Caterers and didn't know whether a wedding reception had ever been held there (Tr. 655-657).

On redirect, Tramunti specifically remembered not having talked to Gugliaro at the Fusco wedding (even though a few minutes before he had been unsure whether he had been there at all) (Tr. 680-682).

Having so testified in his own behalf, Tramunti cannot, as he attempts to do in his brief, restrict the analysis of the sufficiency of the evidence to the Government's case considered alone. *United States* v. *Pui Kan Lam,* 483 F.2d 1202, 1208 n. 7 (2d Cir. 1973). Indeed, from Tramunti's dodging denials of what the photo plainly suggested, the jury could have readily inferred his guilt. See *United States* v. *Arcuri,* 405 F.2d 691, 695 (2d Cir. 1968), *cert. denied,* 395 U.S. 913 (1969); and cf. *Dyer* v. *MacDougall,* 201 F.2d 265, 269 (2d Cir. 1952).

On summation, the Government argued that the jury could draw two inferences from the photograph and defendant's testimony related to it. First, that the photo, particularly when viewed in the context of people leaving a wedding (as opposed to a movie or a ballgame), shows Tramunti and Gugliaro leaving together, as part of a group known to one another (Tr. 807). And second, any question that Tramunti's failure to remember this was simply an innocent lapse of memory was negatived, not only by his general course of lying in the 1971 trial and again on the stand in the instant case, but also, more particularly, by the convenient way his memory about Claridge Caterers had improved with the years, now that denying ever having been at Claridge Caterers was (in view of the photo) impolitic. "He told [the 1971 Imperial Jury] that he never heard of Claridge Caterers, never been there, never attended a wedding there, never went to the place. He swore to it. He comes in here and he volunteers he was at Claridge Caterers. Somehow his memory gets better. His memory always seems to get better after he leaves the stand no matter when it is. That is just another example of false swearing. Maybe the picture made his memory a little bit better, Government's Exhibit 4" (Tr. 809).

These were perfectly permissible inferences for the jury to draw. They did so, and it followed logically that they convicted Tramunti on Count 4, and properly so.

POINT IV

Appellant's claim under *Brady* v. *Maryland* is without merit.

The facts with respect to appellant's claim of a denial of due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963) are succinctly stated in Judge Bauman's decision denying Tramunti's motion for a new trial or a hearing on this ground:

> "At the trial, the government called Gilbert Dragani who testified that he had seen the defendant in Michael Hellerman's office * in 1970 at the At-Your-Service Leasing stock closing. This testimony was relevant to Count 1 of the instant indictment, which alleged as perjurious defendant's denial that he knew Michael Hellerman. Dragani's testimony came to the government's attention in the following manner.
>
> James Schreiber, the Assistant United States Attorney in charge of the At-Your-Service Leasing stock fraud prosecution ** showed a spread of photographs *** to Dragani while preparing for the trial of that case. One of the photographs depicted the defendant Tramunti, and when Dragani identified it, Schreiber promptly brought this information to the attention of the Assistant United States Attorneys in charge of the instant prosecution.
>
> Subsequent to the trial it was learned that Schreiber had shown the same spread of photographs to two other participants in the A-Y-S-L meeting,

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* Formerly the office of John Dioguardi, where Hellerman had earlier testified to seeing Tramunti (Tr. 89).

** *United States* v. *Vincent Aloi, et al.*, 73 Cr. 669 (presently on appeal, Docket Number 74-1220).

*** 25 photos in all, although some depicted the same persons (Tr. 448).

Andrew Nelson and Donald Fisher. Neither identified the defendant's picture.*

This information was not relayed by Schreiber to the government lawyers in charge of this prosecution, and it did not become known to any of the lawyers in the Tramunti case until Nelson and Fisher testified at the A-Y-S-L stock fraud trial before Judge Knapp" (225a-226a).

Judge Bauman then applied to these facts the standards laid down in *Brady* and its progeny, namely, that to raise a due process issue, the *Brady* claim must relate to material, exculpatory, suppressed evidence. See, *e.g., Moore* v. *Illinois,* 408 U.S. 786, 794-5 (1972); *United States* v. *Brawer,* 367 F. Supp. 156, 169 (S.D.N.Y. 1973), *aff'd,* — F.2d — (2d Cir., May 3, 1974). Judge Bauman found that Tramunti's claim under *Brady* did not meet any one of these requirements, let alone all of them.

A. The Undisclosed Evidence Was Not Material

Assuming for the moment that the undisclosed non-identifications of Tramunti by Nelson and Fisher were exculpatory on the theory that they inferentially contradicted Dragani's testimony, the entire *Brady* claim must fall because the entire issue is so utterly immaterial in the context of this case. As Judge Bauman held: "Dragani's testimony, then, was scarcely the lynchpin of the government's case, not even with regard to Count 1. . . . Having presided at the trial I can attest that the government's

* Schreiber did not ask either Fisher or Nelson about Tramunti or anyone else specifically, nor did he refer to a particular context with reference to the photospread; instead, he simply placed the photos before them (separately) and asked them if they positively recognized anyone in the spread. Fisher identified no one, and Nelson identified Messrs. Lombardo, Fusco and Savino (defendants in the AYSL case). (AYSL transcript, *e.g.*, pp. 2721-22, 2727, 2750-51, 2753, 2763-65, 3200.)

evidence on this count was overwhelming, and thus the undisclosed information cannot be deemed material to the issue of guilt" (229a).

This specific finding of immateriality by Judge Bauman is overwhelmingly supported by the record in this case. To begin with, Dragani's testimony related entirely to Count 1 of the indictment—that Tramunti lied when he denied knowing Hellerman—and had no relation to the other five counts on which the jury also convicted. (Judge Bauman imposed concurrent sentences on all six counts.) Second, Dragani's testimony was but one small item in the overwhelming evidence presented as to Count 1. In addition to Dragani, Michael Hellerman, John Kelsey, Constance Kelsey, and Marianne Hellerman all gave direct testimony that Tramunti knew Hellerman,* and their testimony was strongly corroborated by Bruce Bozzi and Joseph Barone. Hence, as Judge Bauman found, "even assuming that the undisclosed testimony of Nelson and Fisher were able to undermine thoroughly the force of Dragani's testimony, the jury would have been unlikely to reach a different verdict" even as to Count 1 (229a).

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* These four witnesses were also the witnesses who proved that Tramunti lied when he denied knowing John Kelsey (Count 2). (Dragani gave no evidence on the Kelsey count). There is not the slightest reason to suppose that the jury would believe these witnesses on the Kelsey count, but not on the Hellerman count. Moreover, John Kelsey was the only government witness on the three counts which charged that Tramunti lied when he denied knowing Phillip Bonadonno and Murray Taylor and denied attending the Gatsby's meeting. Clearly, if the jury credited Kelsey's uncorroborated testimony on these three counts, it accepted his corroborated testimony on the Hellerman count. Thus, the undisclosed evidence could hardly be said to be material. *Moore* v. *Illinois*, 408 U.S. 786, 797 (1972); *United States* v. *Houle*, 490 F.2d 167, 171 (2d Cir. 1973); *United States* v. *Pfingst*, 490 F.2d 262, 276-77 (2d Cir. 1973); *United States* v. *Brawer*, *supra*.

Moreover, even had Dragani been the primary government witness on Count 1 it is still extremely doubtful that the Fisher and Nelson information would have been material. Dragani, who was awaiting sentence on his plea of guilty to the At-Your-Service Leasing fraud, was vigorously cross-examined about how he had defrauded the public in derogation of his responsibilities as a broker (Tr. 413-14); how he had received leniency by being permitted to plead guilty to only one of 30 counts in the At-You-Service indictment (Tr. 415-417); and how he hoped to avoid jail and receive a favorable sentencing statement by the prosecutor (Tr. 416-421). In summation, defense counsel repeatedly attacked Dragani as being guilty of the worst kinds of frauds, lies and deceptions (Tr. 717); as having a long criminal record and being an expert at lying (Tr. 719-20); and as presently lying in order to receive favored treatment from the government and thus avoid jail (Tr. 722-26, 728, 745, 758-9). Thus, the Fisher and Nelson information would appear to be "of minimal if any value in view of the ammunition already available to assault [Dragani's] credibility". *United States* v. *Pfingst, supra,* 490 F.2d at 277.

B. The Undisclosed Evidence Was Not Suppressed

It is conceded that Government trial counsel in *Tramunti* were unaware that photos had been shown to Nelson and Fisher by Assistant United States Attorney Schreiber and appellant makes no claim that Government trial counsel made any attempt to suppress or conceal evidence. Nor is there any merit to appellant's assertion that Assistant United States Attorney Schreiber was aware of the value of this information to the defense and consciously chose not to reveal it. Schreiber was in no way connected with the grand jury investigation or trial of the *Tramunti* case. Compare *Giglio* v. *United States,* 405 U.S. 150 (1972). Moreover, in the course of preparing the At-Your-Service trial, he made no attempt to question witnesses to obtain information useful for the *Tramunti* case. His obvious

concern was preparing his own lengthy and complicated case for trial. Thus at no time did he ever question "any witness regarding whether Carmine Tramunti was present in another room in Hellerman's office at the time of the At-Your-Service closing since Tramunti did not participate in the meeting itself and was not part of the At-Your-Service fraud" (Schreiber's Affidavit, 198a, and corroborated by Nelson's answer to Goldberg's second question, 237a).

Mr. Schreiber's discovery that Dragani would be a helpful witness in the Tramunti prosecution was completely fortuitous. In the course of interviewing Dragani, Schreiber removed a picture of the defendant Lombardo from a stack of photographs and asked Dragani if he could identify him. Dragani said no but on his own reached into the stack of photos and pulled out Tramunti's photo and said he had seen him in Hellerman's office (Tr. 458-59). This information was of obvious value to the Tramunti prosecution. On the other hand, the mere fact that Nelson and Fisher, who were not questioned about Tramunti in any manner, did not select his picture from a large spread of photographs would not necessarily make an impression on a prosecutor who was interviewing scores of witnesses in preparation for a complicated two month stock fraud trial which was about to commence. See *United States* v. *Pfingst, supra,* 490 F.2d at 276-277; *United States* v. *Keogh,* 391 F.2d 138, 147 (2d Cir. 1968). Moreover, it is ridiculous to assume that Schreiber would have intentionally decided to conceal the results of the photo spread when he knew Nelson and Fisher would be testifying in the immediate future in the At-Your-Service trial in which Jay Goldberg, Tramunti's attorney below, would be representing John Dioguardi, and the photo spread would, of necessity, have to be disclosed (as, indeed, it was).

Moreover, in the instant case it is clear that Tramunti's defense counsel was on sufficient notice as "to enable him

to take advantage of such exculpatory testimony as [Fisher and Nelson] might furnish." *United States* v. *Ruggiero*, 472 F.2d 599, 604 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973). As previously mentioned, Mr. Goldberg was no stranger to the At-You-Service case and its cast of characters, having served as counsel to the defendant John Dioguardi in the pretrial preparations of that case for several months prior to the *Tramunti* case. The indictment in that case (*United States* v. *Aloi, et al.*, 73 Cr. 699) specifically identifies the nine people present at the stock closing (including Nelson and Fisher) about which Dragani testified in the instant case (para. 19(j) of Count One). Prior to the cross-examination of the witness Dragani, defense counsel was supplied with a further copy of that indictment.* However, he made no attempt to interview or subpoena Nelson and Fisher for trial or to seek a continuance for that purpose. Nor, when Assistant United States Attorney Schreiber took the stand below in the mid-trial hearing with reference to the photo spread shown to Dragani did Goldberg inquire whether Schreiber had shown it to any of the other AYSL participants.** Indeed, Mr. Goldberg specifically informed government counsel that he was not concerned with what

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* In addition, defense counsel was supplied, pursuant to 18 U.S.C. § 3500, with Dragani's SEC and Grand Jury testimony and the handwritten interview notes of Assistant United States Attorney Schreiber, all of which dealt with this closing.

** By contrast, in the AYSL trial, when Schreiber was on the stand in connection with the photospread shown to Nelson, attorney Goldberg showed no hesitancy in using the occasion to inquire into any spill-over to the Tramunti case. *E.g.*:

"MR. SCHREIBER: . . . This was from the group of photographs that I showed Mr. Nelson. . . .

MR. NEWMAN: Show me what you showed [Nelson]. That is all I want.

MR. GOLDBERG: Did you show him Tramunti?

MR. SCHREIBER: Yes.

MR. GOLDBERG: Oh, good.

[Pause.]"

[AYSL Transcript p. 2725.]

anyone at the At-Your-Service closing had to say except Kelsey, if he were present. (See affidavits of Assistant United States Attorneys, Gary P. Naftalis and Jed Rakoff, 199a-208a).

As this Court has pointed out in construing *Brady*, "the availability of witnesses to the defense through its own investigation is a relevant consideration." *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 140 (2d Cir. 1964). Similarly in *United States* v. *Soblen*, 301 F.2d 236, 242 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962), the Court pointed out:

> "[W]hile the prosecution has a duty to disclose on its own initiative, exculpatory facts within its exclusive control . . . it has no such burden when the facts are readily available to a diligent defender."

See also *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13, 20 (2d Cir. 1969); *United States* v. *Pollak*, 474 F.2d 828, 832 (2d Cir. 1973).

Rather than pursue his own investigation or call other persons who attended the closing as defense witnesses, Mr. Goldberg made a tactical decision to forcefully argue to the jury that the Government's failure to call other participants at the At-Your-Service closing or recall Hellerman as a witness to support Dragani demonstrated the incredibility of Dragani's story (Tr. 726).

As Judge Bauman stated below in denying the *Brady* claim: "A remarkably similar situation was the subject of comment by our Court of Appeals in *United States* v. *Ruggiero*, 472 F.2d 599 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973):

> 'The purpose of the *Brady* rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure

> that he will not be denied access to exculpatory evidence known to the government but unknown to him. Here the appellant was on notice of the essential facts required to enable him to take advantage of such exculpatory testimony as Lundy and Sheridan might furnish. He was also well aware of the process by which they could be compelled to testify at trial. As long as they could be subpoenaed to testify, their grand jury testimony, if offered in their absence, would have been excluded as hearsay. If appellant wanted their testimony, the obvious and logical course was to subpoena them and put them on the witness stand.'

"Here defense counsel failed to interview Nelson and Fisher, and then attempted to persuade the jury that the defendant was entitled to favorable inferences from the government's failure to call them, or any other participants at the A-Y-S-L meeting, to corroborate Dragani's testimony.

"He now seeks to argue that the government's failure to apprise him of the substance of the testimony of these men was violative of due process.

"As Judge Pollack noted in *Brawer,* this was not a novel strategic ploy of defense counsel then; it has gained no stature since" (230a).

C. The Undisclosed Evidence Was Not Exculpatory

Quite apart from the fact that Judge Bauman found the undisclosed evidence to have been neither material nor suppressed, he also found (227a) an utter failure by Tramunti to show that it was exculpatory in any meaningful sense in the context of the present case. The circumstances surrounding Nelson's and Fisher's inabilities to identify Tramunti's photograph demonstrate that their testimony would have had no appreciable value in impeaching the testimony of Dragani. For example, in the subsequent At-Your-

Service-Leasing (AYSL) trial, after naming people who were at the AYSL stock closing, Fisher testified that there were "one or two other people who were just in the vicinity," and that these unidentified people did not participate in the meeting (AYSL Transcript, pp. 3191-92). If anything, this testimony tends to corroborate rather than contradict the testimony of Dragani and would hardly have been helpful to Tramunti's defense below. Moreover, Fisher was unable to make any court-room or photographic identification of people who were concededly at the closing such as the defendant Lombardo (AYSL Transcript, pp. 3198, 3200).

Nelson, unlike Fisher, was able to identify Lombardo, who was in the ante-room of Hellerman's office (AYSL Transcript, p. 2805), both at trial and from a spread of photos. However, Nelson had seen Lombardo on "several" occasions prior to the closing. (AYSL Transcript, p. 2867). At no time was Nelson questioned regarding whether there were people in the other room in Hellerman's suite and the record is utterly barren as to whether he was physically able to view the other room.* Thus Nelson in no way states that Tramunti was not in the other room in Hellerman's suite.

Mr. Goldberg's cross-examination at the AYSL trial of another participant in the AYSL closing, Edmund Graifer, developed further corroboration of Dragani's testimony in Tramunti's trial.**

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* Although Nelson observed Lombardo in the ante-room or foyer, this is not (contrary to the assertion in Appellant's Brief, p. 50) the same room that Dragani testified that Tramunti was in. The room Tramunti was in was another room across the hall in Hellerman's suite of offices (Tr. 410, 424-25).

** The wholly unsupported allegation by Tramunti that Assistant United States Attorney Schreiber selectively fed favorable material developed from his AYSL trial preparations to the Assistants trying the Tramunti case while withholding exculpatory material is clearly undermined by the fact that Schreiber never informed the Assistants below of the existence of Mr. Graifer.

"Q. When you went there [to the AYSL closing] that was at Mike's office, is that correct? A. I assumed so; that is correct.

Q. Who was present? A. In the office?

Q. Yes. A. There was Ralph Lombardo; there was Mike Hellerman, Arthur Ferdinand, myself; there was Gilbert Dragani, Don Fisher, Andrew Nelson, Gerald Miller, Morris Winters. There were a couple of other people there also, but I don't recall their names.

Q. You said one was a heavy-set fellow? A. Yes.

Q. Did Mr. Schreiber show you any pictures of someone that he said might be the heavy-set person? A. No, sir.

Q. Did you have any discussions with Mr. Schreiber in the past couple of weeks with respect to whether you could recall all the people who were present at the Stoma Investment closing? A. The question Mr. Schreiber asked me was who the people were who were present at the closing, and I stated the same answer I just gave to you now.

Q. Did he show any pictures in the past few weeks? A. No, sir.

Q. Did you know any assistants by the name of Naftalis or Rakoff? A. No, sir.

Q. When you said to Mr. Schreiber or said to this jury that one of the people at the meeting was a heavy-set person—Do you recall that? A. Yes, sir.

Q. And did you have any discussions with Mr. Schreiber about who that heavy-set person might be or was? A. No, sir."

(AYSL Transcript pp. 889-91).

Following the AYSL trial, when Mr. Goldberg made his *Brady* motion in the present case based on the nondisclosure of the Nelson-Fisher non-identifications, Judge Bauman told him that "Before you ask me to hold a hearing I suggest, as the government sort of indicated in the brief, you go to

see Mr. Nelson and Mr. Fisher and find out whether there is anything worth my holding a hearing. . . . I tell you now if that is all that happened, namely, two witnesses looked at the show of pictures and said, I don't recognize anybody, I would not regard that as a violation of the Brady doctrine." (January 30, 1974 Hearing Transcript, pp. 15 and 17). Despite this invitation, and also despite the fact that the Government, on February 1, 1974, sent defense counsel the names, addresses, and telephone numbers of Fisher's and Nelson's attorneys, plus a copy of the photo of Tramunti contained in the photospread shown to Dragani, Tramunti's counsel totally failed to produce a shred of evidence that the inability of Nelson and Fisher to recognize Tramunti's photograph in the photospread was of the slightest value as a contradiction of the trial testimony of Dragani.

In short, Judge Bauman's finding that the allegedly undisclosed evidence was neither exculpatory, material, or meaningfully suppressed is wholly supported by the record, and appellant's *Brady* claim is without merit.*

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* The cases relied upon by appellant, most of which are from other Circuits or antedate *Brady* or both, are in any event inapposite. For example, *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135 (2d Cir. 1964); *Application of Kopatos*, 208 F. Supp. 883 (S.D.N.Y. 1962); and *Jackson* v. *Wainwright*, 390 F.2d 288 (5th Cir. 1968) all involved situations where the Government failed to disclose the existence of eye-witnesses who specifically stated that the defendant was not the perpetrator. In *Meers*, the only evidence connecting the defendant with the crime was the testimony of two eye-witnesses. The Government, however, failed to disclose that two other disinterested eye-witnesses to the robbery "positively stated" that the defendant was not the robber. In *Kapatos*, the Government failed to disclose that a disinterested eye-witness also said that other people had fled from the scene of the crime and the defendant had not. In *Jackson*, the only eye-witness to the rape told the prosecutor that the assailant was a white man and that the defendant, a dark-skinned Negro, was not the rapist. Contrary to the case at bar, the materiality of the information in these cases is obvious.

POINT V

The jury was properly informed of the terms of the understandings between the Government and its witnesses.

Two of the Government witnesses, Michael Hellerman and John Kelsey, had understandings with the Government that if they cooperated and testified as to what they knew, they would not be prosecuted for those of their prior crimes to which they were not pleading guilty, provided that they testified truthfully.* If they testified untruthfully, the entire agreement became a nullity and they could be prosecuted, not only for perjury, but also for all past crimes known to the Government (a few in Kelsey's case, a large number in Hellerman's).

Appellant now contends that making known to the jury the fact that Hellerman and Kelsey would be subject to these additional sanctions if they lied in this case, was somehow "to permit the government to vouch for (their) credibility" (App. Br. 58). Not only is this argument without merit, but also it is hard to believe that Tramunti even has the temerity to make it, given that his entire defense rested on a contention that the Government would knowingly give and indeed was giving a "free ride" (Tr. 323) to perjurious witnesses. *United States* v. *DeAngelis*, 490 F.2d 1004, 1012 (2d Cir. 1974) (concurring opinion of Mansfield, *C.J.*). While the defense could and did argue that the no-perjury proviso of agreements with cooperating conspirators was not an effective bulwark against perjury (Tr. 732-33, 741), surely the Government was entitled to respond to the major defense theme of suborned or silently encouraged perjury by showing objective evidence of the sanctions added to discourage false testimony.

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* A third witness, Gilbert Dragani, had an understanding with the Government with respect to his testimony in the AYSL case, but testified in the Tramunti case under subpoena and without any promise or understanding with respect to that testimony (Tr. 418 ff).

On direct, Hellerman briefly testified, over a general, unspecified objection, to the bare terms of his understanding with the Government (Tr. 60-61).* The cross-examination by Tramunti's counsel consisted, in terms of transcript pages, of 55 pages (Tr. 97-151), of which all but the last 5 were directed, not to the facts of the case about which Hellerman testified on direct, but to lies and deceptions practised by Hellerman in the past and to benefits (in terms of non-prosecution for many of those prior violations) that Hellerman was receiving by his agreement to cooperate with the Government. Even in his questions, defense counsel argued that this agreement gave Hellerman a motive to lie and fabricate. (E.g., Tr. 115-16, 121-127, 131, 133-136, 138-140, 144-146).

In response, the Government, prior to redirect, sought to introduce the entire Hellerman understanding with the Government, which had been reduced to a written agreement dated October 19, 1972. Defense counsel objected to letting the jury see certain portions of the agreement; some of the objections were sustained and the agreement correspondingly redacted (e.g., all references to "organized crime" were removed, Tr. 163-165), although Judge Bauman specifically discounted as both unproven and unlikely the suggestion by defense counsel that some of the provisions in the understanding had been placed there to bolster Hellerman's credibility in subsequent trials (Tr. 165).

But defense counsel did *not* object to, or ask redaction of, the provisions of the written agreement stating that Hellerman must testify "truthfully" and that if he violates

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* Such testimony was clearly admissible on direct. *United States* v. *Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969); Wigmore, *Evidence* (Chadbourne Rev., 1970) § 968, n. 3, at end of note. (Also, of course, a general objection cannot avail on appeal unless there is no proper purpose for which the evidence is admissible. *United States* v. *Klein*, 488 F.2d 481, 482 (2d Cir. 1973).)

any of the terms of the agreement, the Government can prosecute him for all the past violations otherwise immunized by the agreement.

The agreement, as redacted, was introduced (Government Exhibit 6) and read to the jury (Tr. 177-180), immediately followed by an instruction from the Court to the jury that "I have permitted the admission of that agreement in evidence and the reading to you [of it] because there was extensive cross-examination with relation to the arrangements between this witness and the Government. It does not relate to the defendant on trial and is not to be considered against him" (Tr. 180-181). Defense counsel spent his entire recross-examination questioning Hellerman about the agreement and the benefits Hellerman was getting from it (Tr. 184-194).

The situation with respect to the witness Kelsey was much the same, only here the understanding with the Government had been an oral, rather than written agreement.

First, the bare bones of the agreement were sketched on direct examination, including the fact that if Kelsey perjured himself in the future (he had admitted perjuring himself in the past before the Grand Jury and the SEC), the entire understanding with the Government became null and void and he could be prosecuted for all his past crimes (Tr. 283-284). This time—unlike anywhere in the Hellerman testimony—there was a specific defense objection, at the end of the direct examination, to the effect that this put the Government's prestige behind the witness (Tr. 295). The Court overruled the objection, stating that "When somebody asks what the deal is, then I think the deal ought to be entirely spread upon the record," but noting that defense counsel could, if he desired, submit a proposed cautionary charge on this subject (Tr. 295-6). (None was submitted.)

Defense counsel then proceeded, as with Hellerman, to devote virtually all (Tr. 305-346) of a lengthy cross-examination (Tr. 305-353), not to Kelsey's testimony relative to Tramunti, but to Kelsey's prior acts of mendacity and the benefits he expected to reap from his present cooperation. Even a few excerpts should convey the flavor of this cross-examination:

> "Q. It is fair to say that in the period of time that you were a broker-dealer, you were on countless occasions a liar, cheater and a swindler?
>
> Mr. Rakoff: Objection, your Honor.
>
> The Court: Sustained.
>
> Mr. Naftalis: May we have a specific instruction, your Honor? He knows better.
>
> The Court: That was more a mini-summation than a question, and the jury is instructed to disregard the last so-called question.
>
> Q. Did you ever tell the Court that's what you were? Did you ever say to a Court you were a liar, cheater and swindler?
>
> The Court: Sustained" (Tr. 329).

* * * * *

> "Q. In telling this grand jury, isn't it so that on numerous occasions in your grand jury testimony you lied to the grand jury?. . . A. In substance,—if this is the grand jury that you and I are referring to, I did tell a lot of lies, sir, yes.
>
> Q. You committed perjury before the grand jury, right? A. I told a lot of lies.
>
> Q. You were guilty of false swearing before the grand jury; is that correct? A. Yes, sir.
>
> Q. When are you to be sentenced for these crimes of perjury and false swearing? A. I don't know.
>
> Q. You have never even been indicted for this, have you? A. No, sir" (Tr. 331).

* * * * *

"Q. And you knew when you said that that was false, isn't that so? A. That is correct, sir.

Q. That that was perjurious——

Mr. Rakoff: Your Honor,——

The Court: Sustained.

Q. And no one has suggested to you that you run the risk at this stage of being indicted for that perjury?

Mr. Rakoff: Objection.

The Court: Sustained.

Q. Do you have any expectation that as long as you testify for the Government you are ever going to have to stand before the bar of justice in connection with the perjury——

Mr. Rakoff: Objection.

The Court: Sustained, and move on to another area.

Mr. Goldberg: [Still in front of the jury]: May I move on to the SEC perjury? I will drop the grand jury.

The Court: Well, do something else" (Tr. 339).

Toward the very end of the cross-examination, defense counsel switched strategy a bit and, bringing out certain statements unfavorable to Tramunti made by Kelsey at the time of his appearance in the 1971 Imperial trial (when Kelsey first made his agreement wtih the Government), suggested that Kelsey was giving the same testimony now because, under the terms of his agreement with the Government, he would be prosecuted if he admitted he had perjured himself at the Imperial trial. That is, defense counsel sought to show that the agreement, far from giving Kelsey a motive to tell the truth, gave him a motive to lie (Tr. 344, 346, and similarly in the defense summation, Tr. 739).

On redirect, the Government first sought to clarify that the Grand Jury and SEC perjuries had occurred before Kelsey had confessed and made a fresh start. The Government then brought out, in the questioning reprinted at page 60 of the Appellant's brief, that Kelsey had testified four times since that time. These questions, which were not objected to at all by defense counsel, were for the perfectly proper purpose of showing that Kelsey had been on the stand frequently since the time of his confession to the Government, so that Government counsel could argue on summation (and did—Tr. 789) that while defense counsel had been able to cross-examine Kelsey about endless lies and contradictions in his testimony given while he was still a stock swindler, this was not the whole story, because Kelsey had testified repeatedly since he confessed, and defense counsel here had not been able to find a single lie or contradiction in those post-confession testimonies with which to cross-examine him.

Then, at the very end of the above series of questions (Tr. 358), the Government began a question with "Have you told any lies—." Before any more got out, there was a defense objection.* The objection was sustained, and the Court, sua sponte, gave the jury a specific instruction to disregard the question. Appellant's contention that this half-question, never completed or answered, and the subject of a specific warning, somehow invoked the credibility of the Government behind the testimony of Kelsey in fashion warranting reversal of Tramunti's conviction, is a remarkable example of building mountains from molehills.**

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* As specified a few moments later at the side-bar (Tr. 360), the defense objection related not at all to the point raised by appellant here on appeal.

** Cf. *United States* v. *Cohen*, 489 F.2d 945, 951 (2d 1973): "In the overall context of this ten day trial involving approximately 1,700 pages of transcript, we do not think that the asking of this one question was in and of itself prejudicial error, particularly in the light of the Court's firm action sustaining the objection and pointing out the immateriality of it . . ."

Turning, finally, to summations, it seems fair to say that the entire two-hour defense summation (Tr. 706-759) was devoted to a single point: that the key Government witnesses were admitted perjurers and con men, and that they had conned the Government (or worse) into letting them off from their past misdeeds in return for their present, false testimony. ". . . [D]oesn't the record show that Hellerman and Kelsey have received such favored treatment from the side calling them to the stand, the Government, . . . Doesn't the record show that these witnesses don't come to you as impartial, disinterested witnesses?" (Tr. 722-23) . . . "Announce by your verdict, for everybody to hear, that the time has come when the likes of Michael Hellerman, Jack Kelsey and the Gilbert Draganis will cause no more needless suffering to others, that this Courtroom is no place for the likes of a Hellerman, a Kelsey, a Dragani to solidify or hope to solidfy their deals with the Government and escape punishment for crimes they committed" (Tr. 759).

The Government, for its part, contented itself on summation with the briefest of references (Tr. 776)* to the obvious fact that their agreements gave Hellerman and Kelsey an added motive to tell the truth since "So long as they tell the truth they won't be prosecuted for other crimes they have committed. If they lie on that witness stand they can be prosecuted for perjury as well as other crimes they have committed. Doesn't, ladies and gentlemen, that give them a motive to tell the truth, a motive not to make anything up?"

From this brief sketch, a few conclusions are obvious. First, it was the defense, not the Government, that made the Government witnesses' cooperation agreements a pri-

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* Given the defense summation, the Government would have been justified in going much farther in responding than it actually did. See, *e.g. United States* v. *La Sorsa*, 480 F.2d 522, 526 (2d Cir. 1973).

mary issue of this case. Indeed, it was almost the sole issue so far as the defense was concerned. Second, the brunt of the defense argument was to show that these cooperation agreements were a positive inducement to lie.

In short, the introduction of the full terms of the cooperating witnesses' agreements, including both those provisions that argued a motive to lie and those that argued a motive to tell the truth, was proper and, indeed, a minimal response to the defense's attacks on their credibility.

CONCLUSION

Tramunti's conviction should be affirmed.

Respectfully submitted,

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JED S. RAKOFF,
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Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

S. Andrew Schaffer being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 24th day of May 1974 he served 2 copies ~~copy~~ of the within brief

by placing the same in a properly postpaid franked envelope addressed:

Gretchen White Oberman, Esq.
277 Broadway
New York, New York 10007

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

S. Andrew Schaffer

Sworn to before me this
24 day of May 19 74

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1